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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1361

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. EVELLE J. YOUNGER, Attorney General,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
TED JENNINGS AND OLIVER KAHLE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The People of the State of California, acting by and through Evelle J. Younger, Attorney General of the State of California, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 30, 1975, as modified on June 11, 1975, affirming the District Court's denial of Petitioner's Motion for Preliminary Injunction.

OPINIONS BELOW

On August 16, 1974, the United States District Court for the District of Nevada denied petitioner's motion for pre-

liminary injunction. The Reporter's Transcript of the District Court's decision rendered from the bench is attached to this petition as Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on April 30, 1975, and modified on June 11, 1975. The opinion as modified is attached as Appendix B.[1]

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Judgment in this case by way of opinion on April 30, 1975. A timely Petition for Rehearing was filed on May 14, 1975, and was denied on June 11, 1975.

The jurisdiction of this Court to consider this Petition is based upon 28 U.S.C., section 1254(1).

QUESTION PRESENTED

Under the provisions of the Tahoe Regional Planning Compact (Public Law 91-148, 83 Stats. 360 (1969)) when a split vote occurs on the Governing Body of the Tahoe Regional Planning Agency on a permit application wherein the majority of representatives of one state vote to deny the application and the majority of representatives of the other state vote to approve the application, is the effect of such a vote a default approval of the permit application or is it a denial which operates to fulfill the evident intent of the Compact that there be bi-state cooperation in the Lake Tahoe Basin.

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1. This case has previously been before this Court with regard to a bond as a condition of an injunction pending appeal. On November 22, 1974, Associate Justice William O. Douglas issued a stay of the Ninth Circuit's Order that the State of California post a $3.5 million bond or forfeit the injunction pending appeal. On December 20, 1974, Justice Douglas dissolved his stay order.

STATUTES INVOLVED

This case involves an interpretation of the Tahoe Regional Planning Compact which is set out in its entirety as Appendix C. Specifically, the resolution of this case involves the interpretation of Article III(g) of the Compact in light of the other provisions of the Compact. Article III(g) states:

> "A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures."

STATEMENT OF THE CASE

This controversy involves the future of the Lake Tahoe Basin, an area of unique and unsurpassed beauty situated high in the Sierras along the California-Nevada border.[2] The California Supreme Court, in noting the famed scenic beauty of the area, quoted Mark Twain's characterization of the lake as:

> ". . . 'A noble sheet of blue water lifted six thousand three hundred feet above the level of the sea * * * with the shadows of the mountains brilliantly photographed

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2. As noted in *U.S. v. Douglas County,* ....., F.Supp. ....., 5 ERC 1577, (D.Nev. 1973), Lake Tahoe has been described as a priceless natural resource. The only other comparable lake in the United States is Crater Lake which is a national park, 16 U.S.C., § 121, *et seq.* The only other lake in the world with similar characteristics is Lake Baikal in Russia. Lake Tahoe and Lake Baikal are presently the subject of a cooperative study by the United States and Russia. See Agreement On Cooperation In the Field of Environmental Protection Between the United States of America and the Union of Soviet Socialists Republic, signed by Presidents Nixon and Podgorny on May 23, 1972, Treaties and Other International Acts Series No. 7345.

upon its still surface * * * the fairest picture the whole earth affords.' 1 *Roughing It.* (Harper & Row) chapter 22, page 156." *People ex rel. Younger v. County of El Dorado,* 487 P.2d 1193 at 1194 (Cal. 1971).

Unfortunately this natural beauty may also contain the virus of its ultimate improverishment for as people come to embrace this natural wonder they also incrementally destroy it. This unfortunate paradox is explained in Senate Report 91-510,[3] which states:

"A combination of modern trends has triggered explosive growth and development in the basin and along the lake shore. First, the advent of the high speed, all-weather highway brought Lake Tahoe to within a short few hours' drive of major California population centers. This was coupled with a postwar boom in tourism and outdoor recreation that converted Lake Tahoe from a quiet summer resort to a year-round playground for water sports, skiing, and entertainment.

"* * *

"This rapid population growth and accompanying commercial and residential development has posed a serious threat to the Lake Tahoe Basin's fragile ecology. Not only the scenic beauty of the region but the very quality of its natural environment are now at stake. Ominous signs of water pollution are becoming all too evident. The native Lahontan cutthroat trout no longer survive in Lake Tahoe because of man-caused changes in the habitat. Tree removal, excavations, highway construction, landfill, and other development activities have scarred the basin slopes and triggered destructive erosion. . . ."

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3. 91st Cong. 1st Sess. (1969) appearing at 115 Cong. Rec. 33068-33069 (1969).

The Legislatures of California and Nevada and the United States Congress recognized the significance of this resource and the peril posed by uncontrolled development. Using the momentous vehicle of an interstate compact, a vehicle heretofore only used by California to allocate the most precious resource in the West, water, the Tahoe Regional Planning Compact was created. Article I of the Compact as passed by California (Government Code section 66800 *et seq.*), and Nevada (Nev. Rev. Stats. 227.190 *et seq.*) and approved by Congress (Pub. L. 91-148; 83 Stats. 360 (1969)) contains the following findings and declaration of policy concerning this problem:

> "(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.
>
> "(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiences of environmental control.
>
> "(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its man-made environment, to preserve the scenic beauty and recreational opportunities of the region, and *it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development,* to exercise effective environmental controls and to perform other essential functions, as enumerated in this title." (Emphasis supplied.)

Pursuant to these findings both Nevada and California, with the permission of Congress, agreed to allow each state some involvement in land use decisions made in the entire Lake Tahoe Basin. The vehicle for this process is the bi-state Tahoe Regional Planning Agency (hereinafter referred to as TRPA) which was mandated to adopt and enforce a regional plan of resource conservation and orderly development. See Articles III, IV, V and VI of the Compact.

TRPA has adopted a Tahoe Regional Plan pursuant to Article V(b) and a Land Use Ordinance to implement and enforce the Regional Plan. Both California and Nevada have acknowledged TRPA's independent authority and obligations and the propriety of delegating such land use authority to the agency. *People ex rel. Younger v. County of El Dorado, supra; State ex rel. List v. County of Douglas,* 524 P.2d 1271 (Nev. 1974).

The official business of TRPA is carried on by the governing body which is composed of five (5) representatives from California; five (5) representatives from Nevada, Article III(a); one (1) non-voting representative from the United States Government, 83 Stats. 360, section 3.

On July 25, 1974, two permit applications came before the governing body. One application by the present respondent Ted Jennings sought approval for a 10 story, 560 room hotel-casino with parking for 1,400 cars in a 3 story parking garage. See TRPA Staff Report attached to Hansen affidavit. The other application by the present respondent Oliver Kahle sought approval for a 7 story, 960 room hotel-casino with parking for 2,400 cars in a 7 story parking garage *Id.* The latter application called for the construction of a 44-foot [high] cut on a slope and the removal of 150 coniferous trees *Id.* The Staff Reports on

both projects indicated they would violate TRPA ordinances on land use intensity and height and would also create enormous problems of traffic congestion, air pollution and siltation into the nearby lake *Id.*[4]

Three votes were taken on each project. On separate motions votes were taken to approve each project, to deny each project and to determine whether each project was properly before the board. See Briner Affidavit. On each vote two of the Nevada representatives voted to the effect that the projects should be denied and three of the Nevada representatives voted to the effect that the projects should be approved. *Id.* All five of the California representatives voted to deny the projects. *Id.* This placed Nevada in favor of the projects (3-2) and California against (5-0). Cummulatively, 7 governing board members voted to deny approval and three voted in favor of approval (7-3) *Id.*

The legal effect of this vote raises the issue presented in this case.

Suit was brought in the Federal District Court for the District of Nevada as it involved a Federal law passed pursuant to the Compact Clause of the United States Constitution, Article I, Section 10, Clause 3 and involved prop-

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4. That these projects if built as proposed will have serious long-term adverse environmental effects cannot seriously be disputed. The comments of the Federal representative on the TRPA governing body are particularly cogent. The appointment of this *ex-officio* non-voting Federal representative on the TRPA governing body was one of the conditions that Congress required when it approved the Compact. 83 Stats. 360, § 3. He expressed the Federal position as follows:

> ". . . But the proposals that do come before you now are of such an increment in scale and form that to us [the federal interests] they clearly pose threats to air, water quality, traffic congestion and in fact they are, as I've heard described today, a large scale urbanization . . . really it strikes at the very heart of some of the objectives of the Compact." Douglas Leisz, Transcript of TRPA Hearing, July 25, 1974, p. 75.

erty located in Nevada. The United States Court of Appeals for the Ninth Circuit has held that the Tahoe Regional Planning Compact is a Federal law for purposes of original Federal Court jurisdiction. *League to Save Lake Tahoe v. Tahoe Reg. Plan. Agcy.*, 507 F.2d 517 (1974), *cert. denied* — U.S. —, 43 L.Ed.2d 654, March 17, 1975.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. This Case Presents a Critical Question Regarding an Interpretation of the Obligations of California and Nevada Under The Tahoe Regional Planning Compact.

In bringing this action the People of the State of California sought to enforce the provisions of the Tahoe Regional Planning Compact and to effectuate the policies to which California, Nevada and the United States have agreed by adopting the Compact. Specifically, in an action unprecedented in our multi-state republic, California sought to stop construction of two large developments in Nevada since in our view they lacked legal approval by the TRPA.[5]

Petitioner's position can be simply stated. The TRPA review process is *de novo* and not appellate in nature. Article III(g), specifically the second sentence, requires, *inter alia*, that the vote of each state's delegation be tabulated separately so that in effect there are a total of two votes on the TRPA governing body, one from each of the two states. It is petitioner's contention that this second sentence,

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5. This case cannot be construed as an attempt by California to interfere with Nevada's regulation of gaming. On June 26, 1975, split votes occurred on three projects proposed in California to build a total of 200 new residences and a 66 unit hotel. See news article attached as Appendix D. If California is successful in this petition and on the merits, these California projects would also lack TRPA approval.

setting forth the so-called dual majority requirement,[6] was satisfied in the instant case in that a quorum was present and a majority vote of the members present from each state actually was taken with respect to each of the contested projects. Therefore "action" was taken within the meaning of the proviso. Thus, Article VI(k), which calls for a default approval by operation of law if TRPA fails to act on a matter within 60 days, is inapplicable since "final action" occurred. Since the sum and substance of all three votes was a split with Nevada in favor of the projects and California against, the projects failed to receive the required majority vote (2) and thus were rejected.

Not only is this interpretation consistent with the literal wording of the Compact but it is the *only* interpretation which serves to effectuate the stated policies of the Compact for this interpretation makes bi-state cooperation and agreement a prerequisite to proceeding with a project. To read the Compact any other way is to return the region to the pre-compact era when each state could allow whatever development it wished without considering the concerns of the other state.

The United States Court of Appeals for the Ninth Circuit has rejected California's position, indicating that when California and Nevada entered the bi-state compact neither relinquished any sovereignty over land within the Tahoe Basin. To reach this result the Ninth Circuit wreaked havoc with the normal democratic parliamentary process by a myopic interpretation of the Compact that creates a type of administrative review unknown in this nation.

With regard to determining the sovereign rights of the respective states, the Ninth Circuit opined:

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6. This refers to the requirement that the majority of representatives from both states must agree before a proposal may be approved.

> "What California fails to acknowledge fully is that the Compact and the TRPA [Tahoe Regional Planning Agency] are *sui generis* offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty over a portion of its territory." Slip Op. p. 6.

The Ninth Circuit went on to assert that the TRPA board was not ". . . an omnipotent board which could enforce its will over the majority vote of one state's delegation." *Id.*, p. 6.

What the Ninth Circuit failed to recognize was that its decision necessarily allowed one state's delegation to be overruled by the other; in fact the opinion creates the potential for an extreme diminution of the sovereignty of each state in the Lake Tahoe Basin for each can no longer even control development within its own borders. Thus the holding fails to accomplish its avowed purpose of preserving the sovereignty of each state.

The explanation for this paradox turns upon the application of the Ninth Circuit's decision to specific fact situations. In the issue before the Court a majority of the Nevada representatives voted to approve a project to be built in Nevada and a majority of the California representatives voted against the project. The Ninth Circuit, resting on its premise of retained sovereignty, held that under the provisions of the Compact, when the majorities of each state do not agree, the vote is a nullity and the project is deemed approved pursuant to Article VI(k) of the Compact (failure to take action within 60 days of application). The fallacy of the premise becomes apparent, however, if the fact situation is changed. As California pointed out in its brief to the Ninth Circuit (Opening Brief, p. 29) if the proposed project were, for example, strip mining on California's side of

the Lake, and a majority of the California delegation voted against it and a majority of the Nevada delegation voted for it, California's sovereignty notwithstanding, the project would be approved under the interpretation adopted by the Court.[7]

The above is set out to illustrate that by entering the Compact both states surrendered some sovereignty in the Lake Tahoe Basin to the Tahoe Regional Planning Agency and assumed an obligation to pursue the purposes for which the Compact was created.

The State of California now petitions this Court to determine the nature and scope of this obligation for the ultimate determination of interstate controversies ". . . is the function and duty of the Supreme Court of the Nation." *Dyer v. Sims*, 341 U.S. 22, 28 (1950).[8]

The importance of the resolution of this issue cannot be overstated. The interstate compact at issue is unprecedented in its attempt to provide for interstate land use regulation. Thus, the extraordinary natural resource value and scenic beauty of Lake Tahoe join water in the arid West as resources of such significance as to warrant use of the interstate compact machinery.

The Supreme Courts of both states have remarked upon the unique value of the Tahoe Basin and the fact that what

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7. It is no answer to this problem that local government in California would not approve such a project for it was the inability of local governments to effectively protect the lake while allowing development that prompted the creation of the Compact. *Note*, Regional Government for Lake Tahoe, 22 *Hastings Law Journal*, 705, 706-707 (1971). See also *Silvera v. City of South Lake Tahoe*, ... P.2d ....., 3 Cal.App.3d 554, 83 Cal.Rptr. 698 (Cal. 1970) for an example of the inadequacy of local government control of development.

8. While the State of Nevada is not a party it did file an *amicus* brief in opposition to petitioner in the Ninth Circuit. This Court has stated that the non-joinder of a participant in a Compact does not affect the Court's ability to determine rights and obligations arising out of a Compact. *Hinderlider v. La Plata Co.*, 304 U.S. 92, 110 (1937).

occurs in one state's part of the basin has profound effects on the other state. In *State ex rel. List v. County of Douglas, et al.*, 524 P.2d 1271 (Nev. 1974), the Nevada Supreme Court quoted with approval the statement of the Supreme Court of California in *People ex rel. Younger v. County of El Dorado*, 487 P.2d 1193, 1201 (Cal. 1971) that:

> "... The water that the Agency [TRPA] is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which theaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an Agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole." 524 P.2d at 1275.

Given the value to the nation of the Lake Tahoe Basin and the importance of resolving the effect of votes where Nevada and California do not agree, it is respectfully submitted that this is an appropriate case for review by this Court.[9]

2. The Resolution of This Issue Will Have an Important Impact Upon the Administration of the Compact and the Land Use Regulations Adopted Pursuant Thereto.

Upon the issuance of the Ninth Circuit's Opinion on April 30, 1975, TRPA (a prevailing party), along with petitioner

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9. While this case involves two projects, the Court's determination of this issue will affect two other projects which were the subject of a split vote and are the subject of the lawsuit, *League to Save Lake Tahoe v. TRPA*, Nev. Dist. Ct. No. Civ. S2989. In addition the projects noted in Appendix D and future projects will be affected.

herein, sought a rehearing. This was the agency's first formal participation in this case other than simply filing the answer to the Complaint. The reason for TRPA's petition is obvious: the Ninth Circuit opinion has destroyed the ability of TRPA effectively to regulate development in the Tahoe Basin and has made the statute unworkable.

The primary basis of TRPA's concern was with regard to the type of review the agency exercises over proposed projects. In a compelling analysis of the Compact and the agency's regulations TRPA sought to convince the Ninth Circuit that it exercises *de novo* and not appellate review over all proposed projects. See Petition for Rehearing and Motion for Modification of Opinion by Appellee Tahoe Regional Planning Agency, pp. 5-10. In its Petition TRPA points out:

> ". . . The very absence of any 'finality' with respect to locally 'issued' Section 4.32 permits persuasively evidences TRPA's action thereunder as *de novo* rather than appellate . . . .
>
> "• • •
>
> "The elaborate TRPA hearing procedure and TRPA staff report and recommendation created by Section 4.34 is inconsistent with the concept of TRPA as merely an appellate tribunal. No 'new look' at the proposal by TRPA staff would be necessary in such context; merely reviewing the record of proceedings before the local governmental entity would suffice. The hearing *de novo*, the staff report and recommendations, and testimony by *any* interested persons all partake of original rather than appellate jurisdiction." *Id.*, p. 9. (Emphasis in Original.)

The type of TRPA review is the crux of the entire case. The Ninth Circuit Court of Appeals premised its opinion on the proposition that TRPA exercises appellate review and therefore, as in judicial proceedings, a tie vote con-

stitutes affirmance of a lower body's decision. Original, unamended Slip Opinion, p. 8 (included herein as Appendix E), citing *State Department of Ecology v. City of Kirkland*, 523 P. 2d 1181, 1184 (Wash. 1974). Appellant, petitioner herein, had argued to the Ninth Circuit that the agency exercises *de novo* review and, therefor, a tie vote constitutes a failure to obtain the requisite vote for passage and the permit application is denied. See Appellant's Opening Brief, pp. 30-34, citing *inter alia*, *Sokolis v. Zoning Board of Appeals of Springfield*, 157 N.E.2d 427 (Ill. 1959); *Montgomery County Board of Appeals v. Walker*, 180 A.2d 865 (Md. Ct. App. 1962).

On June 11, 1974, the Ninth Circuit amended its opinion (*Compare* pages 7 and 8 of Appendices B and E) to reflect some consideration of TRPA's position. The opinion now states that the nature of review by the agency is measured by the vote on the proposed project which of course occurs at the end of the process. Thus, review is generally *de novo*, but when the vote is a split vote, the review is appellate. Slip Opinion, Appendix B, p. 8.

Such a *post hoc* rationalization is illogical, unprecedented and contradicted by the agency's interpretation of the statute it enforces.

The Compact and the TRPA regulations seek to fulfill the policy:

> "... to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment." *People ex rel. Younger v. County of El Dorado*, *supra*, p. 1196.

To this end TRPA took the position before the Ninth Circuit that:

> "Accordingly, by express Compact language, the sovereign creators of TRPA did 'envision it as a super

> bi-state agency whose approval would be a prerequisite to all land development' *if* TRPA by its ordinances so required."[10] Petition for Rehearing, p. 6. (Emphasis in original.)

Consequently, according to the agency charged with the administration of the statute, it is "utterly astounding" (*Id.*, p. 10) that the Ninth Circuit should find that TRPA exercises anything other than *de novo* review of all projects.

Thus, the Ninth Circuit's opinion makes the statute virtually unworkable. It becomes unworkable because the agency cannot know until the vote is taken whether to take testimony, prepare a Staff Report and recommendations (see *e.g.*, attachments to Hansen affidavit) or whether to merely review the record of the lower agency. This confusion cannot be conducive to good administration.[11]

3. The Departure From Established Doctrines of Law Adopted in the Ninth Circuit's Opinion Is So Egregious This Court Should Exercise Its Discretion to Correct the Error.

As pointed out previously, the linchpin of petitioner's argument is that under normal parliamentary procedures if the matter is a *de novo* review any motion failing to receive a majority vote is considered rejected. *Robert's Rules of Order Newly Revised*, § 43 (1970). However, if the process contemplates the review of an issue decided by a lower body then a tie vote has the effect of affirming the lower body's decision. This latter concept is common in judicial proceedings.

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10. According to TRPA its ordinances so require. Petition for Rehearing, p. 7. It is noteworthy in this regard that TRPA admitted in its complaint that the projects in issue violate TRPA's planning ordinances. See Exhibit A to Appellant's Opening Brief.

11. It should also be noted the Court opinion, Slip Op., p. 8, n. 5, leaves totally ambiguous whether judicial review of a project would include review of the administrative record of the local agency or TRPA or both.

The Ninth Circuit has stated, in a Solomonesque but illogical manner, that TRPA exercises both these types of review depending upon the outcome of the vote. Specifically the Ninth Circuit held:

> ". . . However, the TRPA's power of de novo review is fully exercised only when a dual majority for or against a proposal is reached.
>
> "When a split vote is registered, the TRPA assumes a different posture, and becomes more like an appellate court than a zoning board." Slip Op., p. 8.

While it may be true that the Tahoe Regional Planning Compact is *sui generis,* it is impossible to logically reason that the type of review depends on the outcome of the vote. Either the review is *de novo* or appellate.

This is not some quibble with *dicta* of the Court. The case turns upon the resolution of this issue. Furthermore, future agency action and judicial review of that action depends on the resolution of this issue.

In its opinion the Ninth Circuit wrote:

> "The entire dispute turns on the meaning of the words 'action' in Article III(g) and 'final action' in Article VI(k). The reason these simple terms have caused so much difficulty is that appellees' interpretation is inconsistent with common parliamentary procedure." Slip Op., p. 5.

The Court went on to state:

> ". . . In interpreting the provisions of the unique statutory scheme involved here, we must look not to Robert's Rules of Order or decisions dealing with tie votes by zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history." Slip Op., p. 6.

While it is urged that courts should be chary of any decision dispensing with the parliamentary procedures upon

which our democracy is founded, it is also highly significant that the Ninth Circuit's analysis did not embark upon a scrutiny of the "actual language used" in the Compact.

As indicated by the Ninth Circuit, Article III(g) is one of the key provisions of the Compact. It establishes how the agency shall transact business. It reads:

> "A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures."

Petitioner contends that a close inspection of this section indicates it follows the usual structures by which all democratic institutions are organized. The first sentence establishes a quorum, the minimum number of representatives who can take action in the name of the body. The second sentence establishes the requisite vote which must be recorded for any proposal to be passed or adopted in the name of the body. There is nothing unusual about this process and the fact that the Compact is *sui generis* does not change the meaning of the section. Additionally, it is mandated that the Compact be construed to accomplish the intended purposes. Article VIII(a). In view of the environmental problems of the Basin recited in Article I, it is violative of the Article VIII(a) command to conclude that two mammoth projects are approved by default as if never taken up or reviewed by TRPA!

For the Ninth Circuit to reject the obvious interpretation, reject the application of usual parliamentary procedures and arrive at the impossible conclusion that the Tahoe Re-

gional Planning Agency exercises both *de novo* and appellate type review warrants this Court's review.[12]

CONCLUSION

As this is the first time a state has attempted to stop construction in a neighboring state pursuant to a bi-state compact, this case involves a definition of sovereign interests never before passed upon by this Court. As this Court has noted in several recent cases (*Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. SCRAP*, 412 U.S. 669 (1973); *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974)) there is an increasing emphasis in America on the quality of life and in the right to a healthy and aesthetically pleasing existence. The Tahoe Regional Planning Compact creates a resource allocation mechanism designed to protect the rights of the participants in the Compact to a healthy and aesthetically pleasing environment for their citizenry. In this regard, the Tahoe Regional Planning Compact is the first interstate compact to attempt interstate land use regulation. The effectiveness of this noble experiment in protecting the Lake Tahoe Basin will be a significant measure of the ability of our Nation to reverse the trend of despoliation of our natural resources.

Consequently, these weighty issues deserve the attention and deliberation of this Court to provide direction for not only the two states involved but also for other states which share common boundaries bisecting important resources.

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12. The Court also adopted, without comment, the proposition that TRPA could delegate some of its authority to the local governments, thus setting the stage for the appellate type review. Slip Op., p. 6. This is contrary to the long established doctrine to prevent the abuse of power by persons who were not selected by the people to exercise that power. That doctrine is delegated authority cannot be further delegated. *Shankland v. City of Washington*, 30 U.S. 390, 393 (1881); *Hampton & Co. v. United States*, 276 U.S. 394 (1928).

The legal effect of a difference in position on proposed projects between the two state delegations to TRPA is an important question of even broader importance than a case of interstate pollution as was involved in the case of *Illinois v. City of Milwaukee*, 406 U.S. 91 (1971). This is so because the issue raised concerns the correct interpretation of an unprecedented compact dealing with the future of the Lake Tahoe Basin, a national treasure not unlike Niagara Falls or Yellowstone National Park. The Circuit Court decision so totally departed from normal doctrines of law as to frustrate the evident intent of the Compact to make TRPA the mechanism with plenary powers to plan and regulate activities affecting the precious Lake Tahoe Basin.

For all of the above stated reasons, it is respectfully submitted that this Court exercise its discretionary authority to issue a writ of certiorari in this case.

Dated: San Francisco, California 94102

July 24, 1975.

EVELLE J. YOUNGER
Attorney General of California
ROBERT H. O'BRIEN
Assistant Attorney General
NICHOLAS C. YOST
Deputy Attorney General
E. CLEMENT SHUTE, JR.
Deputy Attorney General
ALEXANDER T. HENSON
Deputy Attorney General
Attorneys for Petitioner.

(Appendices follow)

Appendix A

In the United States District Court
for the District of Nevada

Honorable Bruce R. Thompson, Judge

Civil No. R-74-108

People of the State of California, ex rel.,
Evelle J. Younger, Attorney General,
Plaintiff,

vs.

Tahoe Regional Planning Agency,
Ted Jennings, Oliver Kahle,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reno, Nevada, Wednesday, August 14, 1974,
2:00 o'clock p.m.

Allan D. Bunnell,
Official Reporter.

RENO, NEVADA, WEDNESDAY, AUGUST 14, 1974,
2:00 O'CLOCK P.M.

THE COURT: Because of the time limitations involved in this case, it is not possible for a court to give the matter full treatment, so to speak; that is, to study and analyse all the authorities and write an opinion setting forth the Court's views regarding the law. That may or may not be unfortunate, because experience indicates that one of the causes of delay in legal procedures is the desire of a court to do a thorough job and make a full expression of its reasons for a decision in written form.

Because this is an application for an injunction to restrain action which is scheduled to be taken within a few days, it is important that the Court should render a decision promptly, and do the best it can on the basis of the material that has been presented.

I would like to say, however, that I have had the benefit of arguments and briefs from counsel who are obviously very knowledgeable in the field and have cogently expressed their arguments in support and in opposition to the motion for a preliminary injunction.

It probably would be proper to observe that many people—and I know not for what reason—in the United States have acquired the idea that you can go to court and obtain a decision in favor of their personal and individual idea of what is just and equitable in the premises. Such an attitude implies that the Court agrees with the litigant and that the Court's personal opinion is in accord with the litigant's view of what is just and equitable in the premises.

I can frankly state that if I should decide this case strictly on the basis of what I personally believe, what my personal predilections are, I would decide it in favor of the plaintiff, because I personally believe that a prolifera-

tion of hotel casinos on the shores of Lake Tahoe is some form of an abomination and it should be limited as much as possible. But so long as we in our great country adhere to the principle that we are under a government of laws and not of men, my personal opinions and predilections have very little to do with the subject.

The only reason that the plea of the State of California must fail in this particular case is because of the Legislature and Governor of the State of California, the Legislature and Governor of the State of Nevada, those in office at the time the respective acts of those respective legislatures which established the Compact for the Tahoe Regional Planning Agency were adopted, and the Congress of the United States which approved that Compact.

Any difficulties that the Tahoe Regional Planning Agency faces with respect to obtaining what it may well believe to be the true intent and purposes of the legislation are encountered because of what those people who agree with the position of the State of California would consider to be deficiencies in the Compact.

That Compact is the basic charter of this Agency; it is that Agency's constitution. The method of operating and the limitations upon its operations are governed entirely by that Compact; and the Agency itself has recognized that, because when it adopted rules and regulations, as it was authorized to do in implementation of the authority granted to it by the Compact, very carefully in every instance, that I have been able to observe, included in those rules and regulations the specific limitations on its powers which were set up in its own constitution; that is, the Compact itself.

There isn't anything I can add to the presentations of counsel with respect to those limitations. Article III of the Compact, which governs the organization of the Agency, Subsection (g), provides that:

> "A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the Agency."

So under that provision you have to have at least three representatives from California and three representatives from Nevada to constitute a quorum.

> "A majority vote of the members present representing each state shall be required to take action with respect to any matter."

I don't see anything equivocal, ambiguous or undertain about that provision. It is very specific. It provides, in clear and unambiguous terms, that a majority of the quorum present from each state has to agree before action can be taken.

On a mumerical basis, the situation is even more stringent than suggested by counsel if their briefs, who assumed that there would always be a five-five membership present at an Agency meeting. But as I read this—and I see no room for disagreement—if you had three members of the quorum from Nevada present: five members, more than a quorum, from California present at one of those meetings, the vote of the two members from Nevada could stop effective action by the Agency.

No matter what anybody believes as to the usefulness of that sort of provision in a Compact of this kind, it is there; the Court can't change it. The only wai it can be changed is by another joint action by the legislatures of the States of California and Nevada, submitted to the Congress of the United States for its approval.

The subsequent pertinent provision in the Compact, Subsection (k) of Article VI, is not properly characterized as simply a time limitation on action; it is obviously much

more than that. It is in the section of the Compact that specifies the powers of the Tahoe Regional Planning Agency. It provides:

> "Whenever under the provisions of this article, or any ordinance, rule or policy adopted pursuant thereto, the Agency is required to review or approve any proposal, public or private, the Agency shall take final action whether to approve, to require modification or to reject such proposal within sixty days after such proposal is delivered to the Agency. If the Agency does not take final action within sixty days the proposal shall be deemed approved."

And this language is reiterated in Section 4.32 of the Land Use Ordinance adopted by the Agency.

The stalemate in the Agency because of the Charter provision that there must be a majority vote from the quorum present from each state for action to be taken constitutes no action; it is not either approval, rejection or modification.

You wonder how this type of a Charter could have been adopted. Those who oppose these two applications for casino hotels may wonder how anyone in his right mind could set up a charter which contains that sort of a roadblock right in its own composition. It all stems, as I see it, from a lack of willingness on the part of two sovereign states; that is, the States of California and Nevada, to surrender to a bi-state agency a portion of the sovereignty of the particular state and its political subdivisions.

We have seen that same sort of thing on an international scale. When the Charter of the United Nations was negotiated in San Francisco—I think it was in 1948 or thereabouts—it was the United States that insisted on the veto power of one country in the Security Council, and

required that provision to be included in the Charter of the United Nations, because the United States of America did not want to surrender a portion of its sovereignty to the control of an international organization. We are all familiar with the result of that; a provision which over the years substantially impeded the activities of the United Nations because of vetoes exercised by one international power, which was not the United States of America.

We have something of the same situation existing here. It has been indicated that at least initially the State of California was willing to surrender a portion of its sovereignty to the bi-state agency, but acceded to a demand by the State of Nevada that the provision be included that action would be taken only on the approval of the majority of a quorum from each of the participating states. I don't know whether that is true or not, and I don't think it makes much difference, because whether or not one state or another state initiated the proposal, it is clear that both states agreed to it.

I think it also should be observed that I have found nothing in the Compact or in the regulations which requires approval by the Tahoe Regional Planning Agency of a permit in this situation. There are provisions in both the Compact and the regulations for a review of action taken by subordinate political subdivisions of each state involved in the administration and enforcement of the regulations and Compact of the Tahoe Regional Planning Agency, and authority in the Agency to reject any permits or authorizations granted by such subordinate agencies. I presume also that the Tahoe Regional Planning Agency could approve theoretically a proposal which had been rejected by Douglas County, for example, but I can't imagine how that question would ever get before the Agency, because all of the preliminary subordinate approvals must be obtained before

the Tahoe Regional Planning Agency, as the final arbiter, ever reviews the problem.

We are not here to implement what I think should be done for the future of Lake Tahoe; we are here to enforce the law that has been written. The only function of the Court is to interpret and enforce the provisions of the Interstate Compact and the regulations. For me there is no room for an interpretation. I think the provisions are clear, and I am required to comply with them.

We are in, really, the early stages of the control of the Lake Tahoe Basin, and there are many problems that have to be resolved. I do not anticipate that the decision of the Douglas County Commissioners and Planning Commission, the Nevada Lake Tahoe Agency in this particular case, presages an invitation to anyone, who thinks he can make a lot of money, to build another hotel casino at Lake Tahoe, at least I hope it doesn't.

In any event, the motion for a preliminary injunction is denied.

Mr. Breen, will you prepare an appropriate order?

MR. BREEN: I will, your Honor.

THE COURT: And have it in tomorrow.

MR. BREEN: I will, your Honor.

THE COURT: All right, we will stand adjourned.

UNITED STATES OF AMERICA,
DISTRICT OF NEVADA—ss.

I, ALLAN D. BUNNELL, Official Reporter for the United States District Court for the District of Nevada, do hereby certify that I was present and reported in Stenotype writing the proceedings had in the foregoing matter; that I thereafter reduced my said Stenotype notes to typewriting; that the foregoing transcript constitutes a full, true and correct partial transcript of the proceedings had therein.

Dated at Reno, Nevada, this 15th day of August, 1974.

/s/ ALLAN D. BUNNELL
Official Reporter.

Appendix B

AMENDED: June 11, 1975

United States Court of Appeals
for the Ninth Circuit

No. 74-2546

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. EVELLE J. YOUNGER,
Attorney General,
Plaintiff-Appellant,

vs.

TAHOE REGIONAL PLANNING AGENCY,
TED JENNINGS, OLIVER KAHLE,
Defendants-Appellees.

OPINION

[April 30, 1975]

Appeal from the United States District Court
for the District of Nevada

Before: KOELSCH and CHOY, Circuit Judges,
and KELLEHER,* District Judge.

CHOY, Circuit Judge:

The State of California appeals from the district court's refusal to grant a preliminary injunction to halt construction of two hotel-casinos in the Lake Tahoe Basin (the Basin). We affirm.

*Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

In order to protect the natural resources and ecological balance of the Lake Tahoe Basin[1] the states of California and Nevada in 1968 entered into a compact to create a regional agency with extensive powers to regulate and control development within the Basin. Cal. Govt. Code § 66801 (West Supp. 1975); Nev. Rev.Stat. §§ 277.190 et seq. (1973). The compact, known as The Tahoe Regional Planning Compact (the Compact), received the consent of Congress in December 1969. Public Law 91-148, 83 Stat. 360.

The Compact created the Tahoe Regional Planning Agency (TRPA), which was composed of five delegates from each state and one non-voting delegate representing the federal government. The TRPA was charged with responsibility for developing within ninety days a regional interim plan and, within eighteen months, a regional plan which would reflect a wide variety of economic, environ-

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1. Article I of the Compact states:

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title."

mental and social considerations. The Compact also directed the TRPA to adopt all ordinances, rules, regulations and policies necessary to effectuate the regional interim plan and the regional plan. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 518 (9th Cir. 1974).

Pursuant to its mandate, the TRPA adopted various procedural regulations and imposed certain land use, height and density restrictions applicable to developments in the Basin. If a builder wanted to develop more than 200 square feet of land or to erect certain types of structures, he was required first to seek a permit from the local permit-issuing authority (generally, the zoning authority of the county in which the construction was to take place). The permit-issuing authority, according to TRPA regulations, was required to adhere to the policies and land restrictions adopted by the TRPA but was granted the power to issue variance permits under certain circumstances.

Appellees Jennings and Kahle each applied for and was granted an administrative (special use) permit from the governing body of Douglas County, Nevada, for the construction of a hotel-casino. The Douglas County commissioners also granted a height variance whereby each appellee was permitted to construct his hotel-casino to a height greater than the forty foot limit allowed by TRPA's Land Use Ordinance. In granting the variances the commissioners, as required by Section 8.33 of the Land Use Ordinance, made a specific finding that the height variance for each hotel would be a benefit to the general welfare of the region. The projects were then submitted for approval to the Nevada Tahoe Regional Planning Agency, a state agency empowered to exercise environmental control over gaming establishments in the Nevada side of the Basin. The Nevada agency approved both projects.

Jennings and Kahle then submitted the special use and height variance permits to the TRPA for review, as required by Section 4.32 of the Land Use Ordinance. On July 25, 1974, following a hearing before the TRPA, a motion to approve both projects was made as well as a motion to deny both projects. The vote was as follows:

Motion to Approve Projects

	For	*Against*
California Delegates	0	5
Nevada Delegates	3	2

Motion to Deny Projects	*For*	*Against*
California Delegates	5	0
Nevada Delegates	2	3

Soon after the vote, Jennings and Kahle made plans to commence construction on their respective projects, California brought this action to enjoin construction, and the district court issued a temporary restraining order. After a hearing, however, it dissolved the order and denied California's motion for a preliminary injunction. The court's decision was based on its conclusion that the TRPA votes did not constitute "action" within the meaning of the Compact and that the TRPA's failure to take action resulted in the projects being deemed approved under Article VI(k) of the Compact.

Scope of Review

By arguing that the district court's decision may not be reversed unless it amounted to an abuse of discretion, the builders raised a threshold question relating to the scope of appellate review. Although it is a well-settled general rule that the grant or denial of an interlocutory injunction is a matter committed to the discretion of the district court,

that rule does not apply to cases where the court's action is erroneous as a matter of law. *See K-2 Ski Co. v. Head Ski Co., Inc.*, 467 F.2d 1087, 1088 (9th Cir. 1972). Since the district court's denial of the preliminary injunction was based solely upon its *legal* conclusions on the meaning of the TRPA Compact, its action is freely reviewable. *See Societe Comptoir De L'Industrie Colonniere Etablissements Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 35-36 (2d Cir. 1962).

"Final Action"

The unique issue raised by this appeal is whether, within the meaning of the Compact, no "final action" is taken by the TRPA on a proposal unless there is a majority vote by *each* state's delegation that the proposal presented is either approved, rejected, or modified. At the center of this controversy finding California and Nevada on opposite sides are two Compact provisions. Article III(g) provides:

> A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. . . .

And Article VI(k) provides:

> Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved.

According to California, Article III(g) is ambiguous and should be interpreted as follows:

> When a quorum is present and votes on a proposal, if that proposal does not receive a positive vote from the majority of both states then the proposal fails. That vote is final action and if that vote comes within 60 days after the proposal is submitted to the TRPA, Article VI(k) of the Compact with its 60 day provision is irrelevant.

Brief for Appellant at 12-13.

Appellees, on the other hand, emphasize the Article III language that a majority vote of the members representing each state shall be required to *"take action"* with respect to any matter. According to the builders, unless there is a dual majority vote either to approve, reject or modify a proposal, Agency "action" has not taken place and Article VI(k) comes into play even though a vote has been recorded. Appellees' interpretation would dictate that their projects be "deemed approved" under Article VI(k). This is so because the majority of each state's delegation on the TRPA failed either to approve or reject the projects. In other words, appellees suggest that under the statutory and regulatory scheme a "split vote" (i.e., a majority of one state's representatives voting one way and a majority of the other state's representatives voting another) should be considered a nullity, or at least not an "action" or "final action." The district court, finding the language of the two Articles unambiguous, adopted the appellees' view of the voting and approval procedure.

The entire dispute turns on the meaning of the words "action" in Article III(g) and "final action" in Article VI(k). The reason these simple terms have caused so much

difficulty is that appellees' interpretation is inconsistent with common parliamentary procedure. Generally, once a quorum is present, any vote by an organization on any proposal is considered "action." Thus, if there is a proposal on the floor for approval of a new meeting time, and it fails to gain a majority vote (e.g., the vote ends in a tie), "action" has been taken and the proposal is considered *rejected. See* Robert's Rules of Order Newly Revised § 43 (1970). Consistent with this parliamentary rule are numerous decisions by courts holding that tie votes by zoning boards or other governmental bodies have the effect of *denying* the proposals before them. *See, e.g., Sokolis v. Zoning Board of Appeals of Springfield,* 21 Ill. App. 2d 178, 157 N.E. 2d 427 (1959); *Montgomery County Board of Appeals v. Walker,* 288 Md. 574, 180 A.2d 865 (Ct. App. 1962). According to California, these cases indicate that it is absurd to argue that a split vote by the TRPA does not amount to a "denial" or at least "action". California, understandably, wants to avoid the situation where a significant construction project is "deemed approved" even though its proponents can muster no more than a bare majority of one state's delegation or quorum.

Although we find California's argument extremely appealing on an emotional level, it simply does not take into account the plain meaning of the Compact and the intent of its architects. California makes a critical error in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the provisions of the unique statutory scheme involved here, we must look not to Robert's Rules of Order or decisions dealing with tie votes by zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history.

What California fails to acknowledge fully is that the Compact and the TRPA are *sui generis* offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty over a portion of its territory. The TRPA is a powerful planning agency with authority to establish minimum land use standards applicable throughout the Basin and to police the region to ensure compliance with the general plan and any ordinances passed. However, its sovereign creators did not envision it as a super bi-state zoning board whose approval would be a prerequisite to all land development,[2] or as an omnipotent board which could enforce its will over the majority vote of one state's delegation.[3]

The TRPA itself recognizes the limits of its authority and has even delegated some of the authority it has to local government entities. In promulgating the overall plans, regulations and procedures with respect to land use and development, the TRPA provided that the power to issue building permits (including special use and variance permits) remains in the hands of the local zoning authorities. *See* TRPA Land Use Ordinance § 4.10. The TRPA reserved for itself, with respect to permits, a limited *review* function. *See id.* at § 4.32. In other words, neither the statutory

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2. Under the Compact, no building proposal need be reviewed and approved by the TRPA before construction except public works projects (and only those built by parties other than the State of California or Nevada.) Article VI(c).

3. It is clear from the legislative history of the Compact that Nevada, in particular, was extremely reluctant to relinquish much of its sovereignty over land use controls and planning. *See generally* Note, *Regional Government for Lake Tahoe*, 22 Hastings L.J. 705 (1971). For example, Nevada insisted that California eliminate from its law the provision that a simple majority vote of the TRPA quorum could take action on proposals. California acquiesced and adopted the "dual majority" provision, Article III(g).

nor regulatory scheme requires that a proposed project[4] gain the approval of the TRPA before it is built. This is so even if the project has been granted a variance from the general plan by the local permit-issuing authority. TRPA's Land Use Ordinance § 4.32 provides:

> Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon review of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the agency does not take final action within 60 days, the permit shall be deemed approved.

This important regulation is perfectly consistent with Articles III(g) and VI(k) and indicates, as the builders have argued, that "final action" does not take place unless the TRPA does one of three things: 1) approves the permit 2) requires modification or 3) rejects the permit. This regulation evidences TRPA's own construction of the disputed statutory provisions, and we should follow the construction by those charged with the statute's execution unless there are compelling indications that it is wrong. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973). We find no such indications.

Under the TRPA statutory and regulatory scheme, variance and use permits must be submitted for review to the TRPA, and the TRPA has broad discretion to reject or approve on the merits each building permit request. How-

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4. The only exception being public works projects other than those built by the State of California or Nevada. *See* Article VI(c); note 2 *supra*.

ever, the TRPA's power of de novo review is fully exercised only when a dual majority for or against a proposal is reached.

When a split vote is registered, the TRPA assumes a different posture, and becomes more like an appellate court than a zoning board. If an appellate court cannot agree on a majority decision, then the lower body's decision stands affirmed—the rationale being that no "decision" has been reached by the higher authority. *Cf. State Department of Ecology v. City of Kirkland,* 84 Wash. 2d 25, 523 P.2d 1181, 1184 (1974). Similarly, in this case where no dual majority was mustered for either approval or rejection, we conclude that no "decision" was ever rendered nor "final action" ever taken by the TRPA. By virtue of Article VI(k) which provides in such a case that the project be deemed approved, the decision of the local permit issuing authority in effect stands affirmed.

Such a reading of the Compact, notwithstanding California's protestations to the contrary,[5] does not gut its provisions nor frustrate its purpose. The district court's interpretation of Articles III(g) and VI(k), which we affirm, gives effect to the statutory scheme carefully devised by two states reluctant to relinquish very much sovereignty. That the Compact may not be a powerful antigrowth measure in that it permits a majority of one state to stop effective action by the TRPA is not the result of a court imposed

5. California also argues that such an interpretation would allow construction of projects that are in blatant violation of the regional plan. Two responses are appropriate: First, the TRPA chose to vest variance-granting power in the local authorities and set up guidelines for them to follow; second and more important, if the local authorities violate the variance guidelines and other ordinances in granting permits, either state as well as the TRPA has the right to bring action in state or federal court seeking compliance with the regional plan and the TRPA's regulations. *See* Article VI(b).

interpretation but of deliberate action by the legislatures of Nevada and California and the Congress of the United States. This court is not empowered to rewrite the Compact. California's remedy lies solely with the legislative branches of the parties to the Compact.

AFFIRMED.

Appendix C

Public Law 91-148

AN ACT

To grant the consent of the Congress to the Tahoe regional planning compact, to authorize the Secretary of the Interior and others to cooperate with the planning agency thereby created, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe regional planning compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

"TAHOE REGIONAL PLANNING COMPACT

"Article I. Findings and Declarations of Policy

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the

region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is impertative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title.

"ARTICLE II. DEFINITIONS

"As used in this compact:

"(a) 'Region,' includes Lake Tahoe, the adjacent parts of the Counties of Douglas, Ormsby, and Washoe lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B. &M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

"(b) 'Agency' means the Tahoe Regional Planning Agency.

"(c) 'Governing body' means the governing board of the Tahoe Regional Planning Agency.

"(d) 'Regional plan' shall mean the long-term general plan for the development of the region.

"(e) 'Interim plan' shall mean the interim regional plan adopted pending the adoption of the regional plan.

"(f) 'Planning commission' means the advisory planning commission appointed pursuant to paragraph (h) of Article III.

"ARTICLE III. ORGANIZATION

"(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

"The governing body of the agency shall be constituted as follows:

"One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

"One member appointed by each of the boards of county commissioners of Douglas, Ormsby and Washoe counties. Any member so appointed shall be a resident of the county from which he is appointed and may be, but is not required to be:

"(1) A member of the board which appoints him; and

"(2) a resident of or the owner of real property in the region, as each board of county commissioners may in its own discretion determine. The manner of selecting the person so to be appointed may be further prescribed by county ordinance. A person so appointed shall before taking his seat on the governing body disclose all his economic interests in the region, and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. If any board of county commissioners fails to make an appointment required by this paragraph within 30 days after the effective date of this

act or the occurrence of a vacancy on the governing body, the governor shall make such appointment. The position of a member appointed by a board of county commissioners shall be deemed vacant if such member is absent from three consecutive meetings of the governing body in any calendar year.

"One member appointed by the Governor of California and one member appointed by the Governor of Nevada. The appointment of the California member is subject to Senate confirmation; he shall not be a resident of the region and shall represent the public at large. The member appointed by the Governor of Nevada shall not be a resident of the region and shall represent the public at large.

"The Administrator of the California Resources Agency or his designee and the Director of the Nevada Department of Conservation and Natural Resources or his designee.

"(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

"(c) The term of office of the members of the governing body shall be at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years.

"(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such

meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as 'the first Monday of each month,' and shall not change such date oftener than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date, place and agenda at least 5 days prior to the meeting.

"(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

"(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be two years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

"(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

"(h) An advisory planning commission shall be appointed by the agency, which shall consist of an equal number of members from each state. The commission shall include but shall not be limited to: the chief planning officers of Placer County, El Dorado County, and the City of South

Lake Tahoe in California and the Counties of Douglas, Ormsby, and Washoe in Nevada, the Placer County Director of Sanitation, the El Dorado County Director of Sanitation, the county health officer of Douglas County or his designee, the county health officer of Washoe County or his designee, the Chief of the Bureau of Environment Health of the Health Division of Department of Health, Welfare and Rehabilitation of the State of Nevada or his designee, the executive officer of the Lahontan Regional Water Quality Control Board or his designee, the executive officer of the Tahoe Regional Planning Agency who shall act as chairman and at least four lay members each of whom shall be a resident of the region.

"(i) The agency shall establish and maintain an office within the region. The agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

"(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken. Upon receipt of certified copies of the resolutions or notifications appointing the members of the governing body, the Secretary of State of each respective state shall notify the Governor of the state who shall, after consultation with the Governor of the other state, issue a concurrent call for the organization meeting of the governing body at a location determined jointly by the two governors.

"(k) Each state may provide by law for the disclosure or elimination of conflicts of interest on the part of members of the governing body appointed from that state.

"ARTICLE IV. PERSONNEL

"(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this act or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

"(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency, and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

"(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

"ARTICLE V. PLANNING

"(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to

its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this paragraph shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

"The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this paragraph.

"If a request is made for the amendment of the regional plan by:

> "(1) a political subdivision a part of whose territory would be affected by such amendment; or
>
> "(2) the owner or lessee of real property which would be affected by such amendment.

the governing body shall complete its action on such amendment within 60 days after such request is delivered to the agency.

"Tahoe Regional Plan

"(b) Within 15 months after the formation of the agency, the planning commission shall recommend a regional plan.

Within 18 months after the formation of the agency, the governing body shall adopt a regional plan. After adoption, the planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards, and elements of the regional plan.

"The regional plan shall include the following correlated elements:

"(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.

"(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to, freeways, parkways, highways, transportation facilities, transit routes, waterways, navigation and aviation aids and facilities, and appurtenant terminals and facilities for the movement of people and goods within the region.

"(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

"(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands,

parks and parkways, riding and hiking trails, beaches and playgrounds, marinas and other recreational facilities.

"(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

"In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region. Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private individuals.

"(c) All provisions of the Tahoe regional general plan shall be enforced by the agency and by the states, counties and cities in the region.

"TAHOE REGIONAL INTERIM PLAN

"(d) Within 60 days after the formation of the agency, the planning commission shall recommend a regional interim plan. Within 90 days after the formation of the

agency, the governing body shall adopt a regional interim plan. The interim plan shall consist of statements of development policies, criteria and standards for planning and development, of plans or portions of plans, and projects and planning decisions, which the agency finds it necessary to adopt and administer on an interim basis in accordance with the substantive powers granted to it in this agreement.

"(e) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan and interim plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

"(f) All provisions of the interim plan shall be enforced by the agency and by the states, the counties, and cities.

"ARTICLE VI. AGENCY'S POWERS

"(a) The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans. Every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. The regulations shall contain general, regional standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers; harbors, breakwaters; or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and

sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the interim or general plan.

"Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the interim plan or the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

"Interim regulations shall be adopted within 90 days from the formation of the agency and final regulations within 18 months after the formation of the agency.

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

"(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

"(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment.

"(b) All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

"(c) Except as otherwise provided in paragraph (d), all public works projects shall be reviewed prior to construction and approved by the agency as to the project's compliance with the adopted regional general plan.

"(d) All plans, programs and proposals of the State of California or Nevada, or of its executive or administrative agencies, which may substantially affect, or may specifically apply, to the uses of land, water, air, space and other natural resources in the region, including but not limited to public works plans, programs and proposals concerning highway routing, design and construction, shall be referred to the agency for its review, as to conformity with the regional plan or interim plan, and for report and recommendations by the agency to the executive head of the state agency concerned and to the Governor. A public works project which is initiated and is to be constructed by a department of either state shall be submitted to the agency for review and recommendation, but may be constructed as proposed.

"(e) The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules,

regulations and policies. If it is found that the general plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

"(f) Violation of any ordinance of the agency is a misdemeanor.

"(g) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

"(h) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

"(i) Whenever a new city is formed within the region, the membership of the governing body shall be increased by two additional members, one appointed by, and who shall be a member of, the legislative body of the new city, and one appointed by the Governor of the state in which the city is not located. A member appointed by the Governor of California is subject to Senate confirmation.

"(j) Every record of the agency, whether public or not, shall be open for examination to the Legislative Analyst of the State of California and the Fiscal Analyst of the State of Nevada.

"(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final

action within 60 days, the proposal shall be deemed approved.

"ARTICLE VII. FINANCES

"(a) Except as provided in paragraph (e), on or before December 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion not more than $150,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. Each county in California shall pay the sum allotted to it by the agency from any funds available therefor and may levy a tax on any taxable property within its boundaries sufficient to pay the amount so allocated to it. Each county in Nevada shall pay such sums from its general fund or from any other moneys available therefor.

"(b) The agency may fix and collect reasonable fees for any services rendered by it.

"(c) The agency shall be strictly accountable to any county in the region for all funds paid by it to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursements.

"(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds.

"(e) As soon as possible after the ratification of this compact, the agency shall estimate the amount of money necessary to support its activities:

"(1) For the remainder of the then-current fiscal year; and

"(2) If the first estimate is made between January 1 and June 30, for the fiscal year beginning on July 1 of that calendar year.

The agency shall then allot such amount among the several counties, subject to the restriction and in the manner provided in paragraph (a), and each county shall pay such amount.

"(f) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

"ARTICLE VIII. MISCELLANEOUS

"(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in paragraph (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

"(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it

from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

"(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

"(d) No provision of this compact shall have any effect upon the allocation or distribution of interstate waters or upon any appropriative water right."

SEC. 2. The Secretary of the Interior and the Secretary of Agriculture are authorized, upon request of the Tahoe Regional Planning Agency, to cooperate with said agency in all respects compatible with carrying out the normal duties of their Departments.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the Tahoe regional planning governing board.

SEC. 4. Any additional powers conferred on the agency pursuant to article VIII(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

SEC. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

SEC. 7. The right to alter, amend or repeal this Act is expressly reserved.

Approved December 18, 1969.

Appendix D

San Francisco Chronicle

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Fri., June 27, 1975

North Shore

TAHOE HOUSING CLEARS A HURDLE

South Lake Tahoe

The Tahoe Regional Planning Agency cleared the way yesterday for construction of 200 new houses and 66 motel units on the lake's North Shore once sewer problems in the area are solved.

The projects still require the approval of the California Tahoe Regional Planning Agency, which is considering strict growth controls in the portion of the lake basin within its jurisdiction.

The proposed developments were approved by the California-Nevada agency through a set of complicated voting rules. Two of the three Nevada members present and one of California's five members opposed the project. In the absence of a dual majority, the projects automatically won authorization.

The projects are North Rim, a 100-unit condominium development and the Boatworks, a 66-unit motel, both to be built at Tahoe City by the Moana Corp., and the Chambers Landing development of 116 housing units and recreational facilities planned by Perini Lake Tahoe Properties Inc. for a site near Homewood.

Another development, Alpine Tahoe, 100 condominiums proposed by the Dillingham Co., was delayed for 30 days. But the agency is expected to approve it, too, subject to the same sewage disposal limitation, if a height variance is granted.

The approved developments may be held up until a new sewer system and treatment plant are finished in two or three years. But representatives of the firms contemplating building urged agency action in order to keep their plans alive.

Agency members favoring the projects expressed reluctance to force developers to return to the agency with their plans after sewage problems are corrected and risk losing their place in line for sewer hookups.

Our Correspondent

Appendix E

United States Court of Appeals
for the Ninth Circuit

No. 74-2546

People of the State of California
ex. rel. Evelle J. Younger,
Attorney General,
Plaintiff-Appellant,

vs.

Tahoe Regional Planning Agency,
Ted Jennings, Oliver Kahle,
Defendants-Appellees.

OPINION

[April 30, 1975]

Appeal from the United States District Court
for the District of Nevada

Before: Koelsch and Choy, Circuit Judges,
and Kelleher,* District Judge.

Choy, Circuit Judge:

The State of California appeals from the district court's refusal to grant a preliminary injunction to halt construction of two hotel-casinos in the Lake Tahoe Basin (the Basin). We affirm.

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*Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

In order to protect the natural resources and ecological balance of the Lake Tahoe Basin[1] the states of California and Nevada in 1968 entered into a compact to create a regional agency with extensive powers to regulate and control development within the Basin. Cal. Govt. Code § 66801 (West Supp. 1975); Nev. Rev.Stat. §§ 277.190 et seq. (1973). The compact, known as The Tahoe Regional Planning Compact (the Compact), received the consent of Congress in December 1969. Public Law 91-148, 83 Stat. 360.

The Compact created the Tahoe Regional Planning Agency (TRPA), which was composed of five delegates from each state and one non-voting delegate representing the federal government. The TRPA was charged with responsibility for developing within ninety days a regional interim plan and, within eighteen months, a regional plan which would reflect a wide variety of economic, environmental and social considerations. The Compact also directed the TRPA to adopt all ordinances, rules, regulations and

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1. Article I of the Compact states:

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title."

policies necessary to effectuate the regional interim plan and the regional plan. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 518 (9th Cir. 1974).

Pursuant to its mandate, the TRPA adopted various procedural regulations and imposed certain land use, height and density restrictions applicable to developments in the Basin. If a builder wanted to develop more than 200 square feet of land or to erect certain types of structures, he was required first to seek a permit from the local permit-issuing authority (generally, the zoning authority of the county in which the construction was to take place). The permit-issuing authority, according to TRPA regulations, was required to adhere to the policies and land restrictions adopted by the TRPA but was granted the power to issue variance permits under certain circumstances.

Appellees Jennings and Kahle each applied for and was granted an administrative (special use) permit from the governing body of Douglas County, Nevada, for the construction of a hotel-casino. The Douglas County commissioners also granted a height variance whereby each appellee was permitted to construct his hotel-casino to a height greater than the forty foot limit allowed by TRPA's Land Use Ordinance. In granting the variances the commissioners, as required by Section 8.33 of the Land Use Ordinance, made a specific finding that the height variance for each hotel would be a benefit to the general welfare of the region. The projects were then submitted for approval to the Nevada Tahoe Regional Planning Agency, a state agency empowered to exercise environmental control over gaming establishments in the Nevada side of the Basin. The Nevada agency approved both projects.

Jennings and Kahle then submitted the special use and height variance permits to the TRPA for review, as required by Section 4.32 of the Land Use Ordinance. On July 25, 1974, following a hearing before the TRPA, a motion to approve both projects was made as well as a motion to deny both projects. The vote was as follows:

Motion to Approve Projects

	For	*Against*
California Delegates	0	5
Nevada Delegates	3	2

Motion to Deny Projects

	For	*Against*
California Delegates	5	0
Nevada Delegates	2	3

Soon after the vote, Jennings and Kahle made plans to commence construction on their respective projects, California brought this action to enjoin construction, and the district court issued a temporary restraining order. After a hearing, however, it dissolved the order and denied California's motion for a preliminary injunction. The court's decision was based on its conclusion that the TRPA votes did not constitute "action" within the meaning of the Compact and that the TRPA's failure to take action resulted in the projects being deemed approved under Article VI(k) of the Compact.

Scope of Review

By arguing that the district court's decision may not be reversed unless it amounted to an abuse of discretion, the builders raised a threshold question relating to the scope of appellate review. Although it is a well-settled general rule that the grant or denial of an interlocutory injunction

is a matter committed to the discretion of the district court, that rule does not apply to cases where the court's action is erroneous as a matter of law. *See K-2 Ski Co. v. Head Ski Co., Inc.,* 467 F.2d 1087, 1088 (9th Cir. 1972). Since the district court's denial of the preliminary injunction was based solely upon its *legal* conclusions on the meaning of the TRPA Compact, its action is freely reviewable. *See Societe Comptoir De L'Industrie Colonniere Establissements Boussac v. Alexander's Department Stores, Inc.,* 299 F.2d 33, 35-36 (2d Cir. 1962).

"Final Action"

The unique issue raised by this appeal is whether, within the meaning of the Compact, no "final action" is taken by the TRPA on a proposal unless there is a majority vote by *each* state's delegation that the proposal presented is either approved, rejected, or modified. At the center of this controversy finding California and Nevada on opposite sides are two Compact provisions. Article III(g) provides:

> A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. . . .

And Article VI(k) provides:

> Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does

> not take final action within 60 days, the proposal shall be deemed approved.

According to California, Article III(g) is ambiguous and should be interpreted as follows:

> When a quorum is present and votes on a proposal, if that proposal does not receive a positive vote from the majority of both states then the proposal fails. That vote is final action and if that vote comes within 60 days after the proposal is submitted to the TRPA, Article VI(k) of the Compact with its 60 day provision is irrelevant.

Brief for Appellant at 12-13.

Appellees, on the other hand, emphasize the Article III language that a majority vote of the members representing each state shall be required to *"take action"* with respect to any matter. According to the builders, unless there is a dual majority vote either to approve, reject or modify a proposal, Agency "action" has not taken place and Article VI(k) comes into play even though a vote has been recorded. Appellees' interpretation would dictate that their projects be "deemed approved" under Article VI(k). This is so because the majority of each state's delegation on the TRPA failed either to approve or reject the projects. In other words, appellees suggest that under the statutory and regulatory scheme a "split vote" (i.e., a majority of one state's representatives voting one way and a majority of the other state's representatives voting another) should be considered a nullity, or at least not an "action" or "final action." The district court, finding the language of the two Articles unambiguous, adopted the appellees' view of the voting and approval procedure.

The entire dispute turns on the meaning of the words "action" in Article III(g) and "final action" in Article VI(k). The reason these simple terms have caused so much difficulty is that appellees' interpretation is inconsistent with common parliamentary procedure. Generally, once a quorum is present, any vote by an organization on any proposal is considered "action." Thus, if there is a proposal on the floor for approval of a new meeting time, and it fails to gain a majority vote (e.g., the vote ends in a tie), "action" has been taken and the proposal is considered *rejected. See* Robert's Rules of Order Newly Revised § 43 (1970). Consistent with this parliamentary rule are numerous decisions by courts holding that tie votes by zoning boards or other governmental bodies have the effect of *denying* the proposals before them. *See, e.g., Sokolis v. Zoning Board of Appeals of Springfield,* 21 Ill. App. 2d 178, 157 N.E. 2d 427 (1959); *Montgomery County Board of Appeals v. Walker,* 288 Md. 574, 180 A.2d 865 (Ct. App. 1962). According to California, these cases indicate that it is absurd to argue that a split vote by the TRPA does not amount to a "denial" or at least "action". California, understandably, wants to avoid the situation where a significant construction project is "deemed approved" even though its proponents can muster no more than a bare majority of one state's delegation or quorum.

Although we find California's argument extremely appealing on an emotional level, it simply does not take into account the plain meaning of the Compact and the intent of its architects. California makes a critical eror in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the provisions of the unique statutory scheme involved here, we must look not to Robert's Rules of Order or decisions dealing with tie

votes by zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history.

What California fails to acknowledge fully is that the Compact and the TRPA are *sui generis* offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty over a portion of its territory. The TRPA is a powerful planning agency with authority to establish minimum land use standards applicable throughout the Basin and to police the region to ensure compliance with the general plan and any ordinances passed. However, its sovereign creators did not envision it as a super bi-state zoning board whose approval would be a prerequisite to all land development,[2] or as an omnipotent board which could enforce its will over the majority vote of one state's delegation.[3]

The TRPA itself recognizes the limits of its authority, and the intent of the states not to pre-empt the zoning power of the local governmental entities. In promulgating the overall plans, regulations and procedures with respect to land use and development, the TRPA provided that the power to issue building permits (including special use and variance permits) remains in the hands of the local zoning authorities. *See* TRPA Land Use Ordinance § 4.10. The

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2. Under the Compact, no building proposal need be reviewed and approved by the TRPA before construction except public works projects (and only those built by parties other than the State of California or Nevada.) Article VI(c).

3. It is clear from the legislative history of the Compact that Nevada, in particular, was extremely reluctant to relinquish much of its sovereignty over land use controls and planning. *See generally* Note, *Regional Government for Lake Tahoe,* 22 Hastings L.J. 705 (1971). For example, Nevada insisted that California eliminate from its law the provision that a simple majority vote of the TRPA quorum could take action on proposals. California acquiesced and adopted the "dual majority" provision, Article III(g).

TRPA reserved for itself, with respect to permits, a limited *review* function. *See id.* at § 4.32. In other words, neither the statutory nor regulatory scheme requires that a proposed project[4] gain the approval of the TRPA before it is built. This is so even if the project has been granted a variance from the general plan by the local permit-issuing authority. TRPA's Land Use Ordinance § 4.32 provides:

> Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon review of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the agency does not take final action within 60 days, the permit shall be deemed approved.

This important regulation is perfectly consistent with Articles III(g) and VI(k) and indicates, as the builders have argued, that "final action" does not take place unless the TRPA does one of three things: 1) approves the permit 2) requires modification or 3) rejects the permit. This regulation evidences TRPA's own construction of the disputed statutory provisions, and we should follow the construction by those charged with the statute's execution unless there are compelling indications that it is wrong. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421 (1973). We find no such indications.

Under the TRPA statutory and regulatory scheme, TRPA's power with respect to zoning permits is not unlike

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4. The only exception being public works projects other than those built by the State of California or Nevada. *See* Article VI(c); note 2 *supra*.

judicial or administrative *review*. If a court or reviewing board cannot agree on a majority decision, then the lower body's decision stands affirmed—the rationale being that no "decision" has been reached by the higher authority. *See State Department of Ecology v. City of Kirkland*, 84 Wash. 2d 25, 523 P.2d 1181, 1184 (1974). Similarly, in this case where no dual majority was mustered for either approval or rejection, we conclude that no "decision" was ever rendered nor "final action" ever taken by the TRPA.

Such a reading of the Compact, notwithstanding California's protestations to the contrary,[5] does not gut its provisions nor frustrate its purpose. The district court's interpretation of Articles III(g) and VI(k), which we affirm, gives effect to the statutory scheme carefully devised by two states reluctant to relinquish very much sovereignty. That the Compact may not be a powerful anti-growth measure in that it permits a majority of one state to stop effective action by the TRPA is not the result of a court imposed interpretation but of deliberate action by the legislatures of Nevada and California and the Congress of the United States. This court is not empowered to rewrite the Compact. California's remedy lies solely with the legislative branches of the parties to the Compact.

AFFIRMED.

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5. California also argues that such an interpretation would allow construction of projects that are in blatant violation of the regional plan. Two responses are appropriate: First, the TRPA chose to vest variance-granting power in the local authorities and set up guidelines for them to follow; second and more important, if the local authorities violate the variance guidelines and other ordinances in granting permits, either state as well as the TRPA has the right to bring action in state or federal court seeking compliance with the regional plan and the TRPA's regulations. *See* Article VI(b).

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1975

No. 75-136

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. EVELLE J. YOUNGER, Attorney General,
Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY
TED JENNINGS and OLIVER KAHLE,
Respondents.

OPPOSITION OF OLIVER KAHLE TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Oliver Kahle, respondent herein, does hereby respectfully pray that this court deny the petition of the People of the State of California for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered herein on April 30, 1975 and modified June 11, 1975.

OPINIONS BELOW AND PREVIOUS ORDERS OF THIS COURT

This action was commenced August 7, 1974 in the United States District Court for the District of Nevada. On August 8, 1974 a temporary restraining order enjoining respondent from constructing a proposed hotel on his property at Lake Tahoe, Douglas County, Nevada, was entered. On August 16, 1974, after hearing, the U. S. District Court denied petitioners application for preliminary injunction and dissolved the temporary restraining order, thus allowing respondent to commence construction. A copy of the court's opinion is attached hereto as Appendix A.

Petitioners immediately appealed the denial of the preliminary injunction to the U. S. Court of Appeals for the Ninth Circuit and on August 22, 1974 the Circuit Court issued an injunction pending appeal to stop construction on respondent's hotel.

On September 3, 1974 the court remanded the case to the district court to determine if a bond should be required and if required, the amount of such bond. On September 30, 1974, pursuant to the order of the Circuit Court, the district court entered an order requiring the People of the State of California to post an injunction bond in the amount of $3,500,000.00.

The district court order requiring a bond was appealed to the circuit court which affirmed the order on November 3, 1974 and required that unless the bond was filed within 10 days, the injunction pending appeal would be dissolved.

The petitioners then, on November 22, 1974, obtained from Associate Justice Douglas of this Court an order staying the order requiring a bond. U.S.S.C. No. A-422. After both parties presented briefs, Justice Douglas, on December 20, 1974, ordered that unless the bond required by the district court was posted, that the injunction pending appeal was dissolved. The bond was never posted and the injunction dissolved by its own terms.

On April 11, 1975, the United States Court of Appeals for the Ninth Circuit ruled that the denial of the preliminary injunction by the district court was proper. The opinion was modified on June 10, 1975 and a copy of the modified opinion is attached as Appendix B.

STATUTES AND ORDINANCES INVOLVED

The Tahoe Regional Planning Compact adopted by both the States of California and Nevada and approved by the United States Congress is the statute of primary concern to this case.[1] Also involved is the Tahoe Regional Planning Agency Land Use Ordinance No. 4 as amended, hereinafter referred to as "Land Use Ordinance."[2]

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[1]Public Law 91-148, 83 Stats. 360 (1969) Cal. Gov. Code 66800 et seq., Nevada Revised Statutes §277.200, attached hereto as Appendix C.

[2]Attached hereto as Appendix D.

STATEMENT OF THE CASE

This controversy is an attempt by the Attorney General of the State of California to force upon the Tahoe Regional Planning Agency, the States of Nevada and California, and particularly the respondents Kahle and Jennings, an interpretation of the Tahoe Regional Planning Compact which was not intended by the legislatures and which cannot be gleaned from the clear language of the Compact.

The sole issue is whether the District Court and the Circuit Court of Appeals properly construed Article III(g) and Article VI(k) of the Compact which provide as follows:

> "(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures." (Appendix C, Page 24.)
>
> "VI(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved." (Appendix C, Page 33.)

California contends that notwithstanding the clear language quoted above and the interpretation of that language adopted by the TRPA, that in this case respondent's project should not be approved unless and until there is a vote to approve by a majority of the delegation of each state.

STATEMENT OF FACTS

The Tahoe Regional Planning Agency (hereinafter referred to as TRPA) created by the Compact is authorized to adopt a master plan and ordinances for land use in the Lake Tahoe Basin.

The Compact specifically admonishes the agency in the adoption of its ordinances to leave in the control of the local governments as much power as is practicable. Article VI(a) of the Compact provides in part as follows:

> "Whenever possible without diminishing the effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the interim or general plan." (Appendix C, Page 31.)

Another provision of Article VI(a) adopted at the request of the State of Nevada to protect its gaming interests is as follows:

> "Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:
>
> (1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.
>
> (2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, to permit the construction of such a business or establishment." (Appendix C, Page 31.)

The property on which respondent Kahle proposes to construct the hotel casino was zoned for use as a business which required a state (gaming) license on February 5, 1968.

Pursuant to the Compact, the TRPA adopted Land Use Ordinance No. 4, relevant portions of which are attached as Appendix D.

Under the Land Use Ordinance, and the local ordinances of Douglas County, respondent Kahle applied for and was granted an administrative permit (special use permit) from the governing body of Douglas County, for the construction of a hotel-casino to be located on U. S. Highway 50, near Stateline, Douglas County, Nevada.

Pursuant to the same provisions, Kahle applied for and was granted a height variance which permitted

the hotel to be constructed to a height greater than 40 feet as allowed by the ordinance. The Douglas County commissioners as required by Section 8.33 of the TRPA Land Use Ordinance made a specific finding that the height variance for the hotel should be approved and that such variance would be a benefit to the general welfare of the region. The project was then submitted for approval to the Nevada Tahoe Regional Planning Agency which was created by the 1973 Nevada Legislature to exercise environmental control over gaming establishments in the Tahoe Basin. See Nevada Revised Statutes 278.780 through 278.838.

On June 12, 1974 the Nevada Tahoe Regional Planning Agency approved the Kahle project and also the project of respondent Jennings.

The TRPA Land Use Ordinance requires that an administrative permit or variance permit must be obtained prior to construction of each of the projects subject to this action. Section 4 of that ordinance provides that the permits shall be issued by the permit issuing authority and defines permit issuing authority as the local government (In this case, Douglas County). Section 4.32 of the Land Use Ordinance provides that the Tahoe Regional Planning Agency shall review such permits and further provides:

> "And upon *review* of any such permit the agency shall take *final action*, whether *to approve*, to require modification *or to reject* such permit *within 60 days* after such permit is delivered to the agency. *If the agency does not take final action within 60 days, the permit shall be deemed*

approved." (Emphasis added) (Appendix D, at Page 49.)

Pursuant to the above quoted provision, the permits and the height variances were submitted to the Tahoe Regional Planning Agency for review. On July 25, 1974, following hearing before the TRPA, motion was made to approve each of the projects which failed for want of a majority of both California and Nevada delegates. A motion was then made to deny each of the projects which again failed when a majority of the Nevada representatives voted against the motion and a majority of the California representatives voted for the motion. The vote was as follows:

1. On motion to approve the projects:

	For	*Against*
California	0	5
Nevada	3	2

2. On motion to deny the projects:

	For	*Against*
California	5	0
Nevada	2	3

In summary, there was never a "dual majority" vote to approve or to deny the projects. Under the established practice of the TRPA the projects were then deemed approved after the expiration of 60 days from the date of their initial filing with the agency. See Tahoe Regional Planning Agency Compact, Article VI(k).

1. Reasons why a writ of certiorari should not be granted

Plaintiff, State of California, states "This controversy involves the future of the Lake Tahoe Basin, an area of unique and unsurpassed beauty situated high in the Sierras along the California-Nevada border." Thereafter follows a quotation from Mark Twain concerning the beauty of the lake. While respondent Kahle concedes that to some extent this controversy involves the future of the lake and certainly concedes that the lake is a beautiful place, that is not the criteria on which this case should be judged. As Judge Thompson stated in denying the State of California's motion for preliminary injunction,

> "We are not here to implement what I think should be done for the future of Lake Tahoe; we are here to enforce the law that has been written. The only function of the Court is to interpret and enforce the provisions of the Interstate Compact and the regulations. For me there is no room for an interpretation. I think the provisions are clear and I am required to comply with them." (Appendix A, Page 7.)

The circuit court in its decision likewise recognized that the rule of law must outweigh the emotional appeal of California's argument,

> "Although we find California's argument extremely appealing on an emotional level, it simply does not take into account the plain meaning of the Compact and the intent of its architects. California makes a critical error in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the

> provisions of the unique statutory scheme involved here, we must look not to Robert's Rules of Order or decisions dealing with tie votes by zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history." (Appendix B, at Page 15.)

The two relevant sentences of the two sections of the Compact when read together are as follows:

> "A majority vote of the members present representing each state shall be required to take action with respect to any matter." Article III(g).
>
> "If the agency does not take final action within 60 days the proposal shall be deemed approved." Article VI(k).

California urges that the language requires that a vote of any kind is "action". The district court and the circuit court both found that this was not the intention of the legislatures nor is it possible under the clear language of the Compact.

The circuit court found that the Land Use Ordinance §4.32 buttressed respondent's contention wherein it is provided that the agency shall take *final action* whether to approve, to require modification or to reject "a permit within 60 days." Indeed this is the construction that the agency has placed upon the provision of the article from the outset. This is evidenced by the practice of the agency in allowing the project of the respondents Kahle and Jennings to proceed and in allowing the other projects referred to both in petitioner's brief and Appendix D to petitioner's brief wherein a dual majority was not obtained.

The legislative history of the Compact as found by the circuit court supports respondent's contention.

An excellent discussion of the legislative history is contained in 22 Hastings Law Journal 705. There, it is pointed out that California first introduced a bill providing for a majority vote of a 15 member governing body to take any action, except action on fiscal matters which required a majority vote of the members of each state. California later amended its bill to provide for a membership of only 5 from each state, so that the members representing the local governments surrounding the lake held the control.

Nevada's 1968 Legislature refused to accept the California version, however, and made several changes. The Nevada version required that any action by the agency (not just fiscal matters) be approved by a majority vote of the members of each state (Article III(g)) and that if the agency failed to act within 60 days, any proposal would be deemed approved. Article VI(k))

The Nevada version also provided a grandfather clause to protect its gaming business. Article VI(a).

After passage by the Nevada Legislature, the California Legislature receded from its previous position and adopted the Compact in its present form as adopted by Nevada.

In summary, the actions of the two legislatures in arriving at the final document offer the best evidence of the legislative intent of the Compact.

The legislatures rejected a strong regional government, and relegated the agency to a reviewing agency

controlled by the local governments; they rejected approval or disapproval by a simple majority of all members and required instead action by a majority of the members of each state; they further provided that this reviewing agency which they created could not overrule the actions of the local government (permit issuing authority) unless a majority of the members of each state's delegation voted to do so. If the members failed to overrule the local government (permit issuing authority) within 60 days from submission of the application for review, then the opportunity to do so is gone.

This is *not* construing the terms of the Compact in a vacuum, as suggested by California, but is in fact giving full effect to their obvious purpose and nature and gives effect to the intent of the legislature. *Johnstone v. Richardson,* 229 P.2d 9 (Cal. 1951), *Market Co. v. Hoffman,* 101 U.S. 112 (1879).

The rule that the changes effected in legislation during its passage are indicative of the legislative intent is widely recognized. In *United States v. St. Paul M & M Railway Co.,* 247 U.S. 310, 62 L. Ed. 1130, 38 Sup. Ct. 525 (1918), the Court said:

> ". . . the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it . . . may be resorted to under proper qualifications." [To determine intent]

See also *In re Hamlin,* 226 N.Y. 407, 124 N.E. 4 (1919).

The changes made by the legislatures of the States of California and Nevada as the Compact was passed by each state, make it clear that the states intended a bi-state agency with limited powers of review and with no authority to overrule a local government's issuance of a permit unless both states concurred.

The legislatures intended to accomplish certain goals, but only in the fashion enumerated. The fact that the legislatures adopted a plan different from the Attorney General's opinion of what plan would best effect the purposes, does not give license to allow a different interpretation. In *Carey v. Donohue,* 240 U.S. 430, 60 L. Ed. 726, 36 Sup. Ct. 386, this court rejected an argument that the bankruptcy law should be read to effect the plan or purpose of the act and said:

> "We cannot but regard the action of Congress as a deliberate refusal to conform the requirements of §60 to those of §3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

California suggests that the project violates the TRPA ordinances on land use intensity and height and creates enormous problems of traffic congestion, air pollution and siltation into the lake. This case is not brought upon the question of whether the projects in fact violate the TRPA ordinances. As to that aspect of the case, however, Roland Adams, the County Manager and Planning Director for Douglas County and former Assistant Executive Officer of the Tahoe Regional Planning Agency states that the pro-

posed project of Kahle is not in fact in violation of any ordinance and that the only ordinance that it might possibly violate is the height ordinance for which a variance was properly granted. See Record on Appeal Page 167 et seq.

California next suggests that the Ninth Circuit Court ruling in fact destroys the sovereignty of one state by suggesting that if a proposed project were, for example, strip mining on the California side and a majority of the California delegation voted against it and a majority of the Nevada delegation voted for it, California sovereignty notwithstanding, the project would be approved. Such an argument is tenuous at best and ignores the clear language of the Compact. In order for any project to consist of "strip mining" there must be an ordinance adopted by a majority vote of both parties to the Compact allowing "strip mining" in the area wherein the project is contemplated. Unless and until such an ordinance is adopted, strip mining is unlawful.

This was the intent of the legislatures, this is in keeping with the clear language of the Compact and this is as contemplated by the decision of the district court and the circuit court.

The land area involved in this case represents less than 1% of the total land area in the entire Tahoe Basin. It represents the only remaining land at the south end of Lake Tahoe which can be developed for a hotel-casino site. In the overall scope of the administration of planning and building at Lake Tahoe, this project and the contemplated project of respond-

ent Jennings is insignificant and does not warrant the granting of a Petition for Certiorari by this Court.

2. The Ninth Circuit Court of Appeals did not depart from established doctrines of law which would warrant the granting of a petition for a writ of certiorari

California complains that the Ninth Circuit Court of Appeals' decision restricts the agency to the position of being strictly an appellate review. It cites the TRPA petition for rehearing wherein it is contended that the TRPA is to have *de novo* review of all projects.

Whether the review is appellate in nature or *de novo* in nature is not relevant. As stated by the Ninth Circuit Court the TRPA is *sui generis*. Simply because the staff of the TRPA is enabled to make specific findings, is enabled to do independent research and investigation and present that information to the TRPA, prior to its vote, does not change the position of the TRPA with respect to the approval of any project. It should be noted that the position of the TRPA was that the bi-state agency approval would be prerequisite "if the TRPA by its ordinances so required". As stated above Section 4.32 does not require approval but merely requires that final action be taken to approve, reject or modify. This is the basic fallacy in petitioner's argument.

California seeks to invoke this court's jurisdiction on the ground that this is a departure from established doctrines. The only established doctrine that California is able to cite is the Robert's Rules of Order Newly Revised, §43. It is clear that Robert's

Rules of Order is not the governing standard in this case. The fact that the Ninth Circuit has so held, in view of the established precedent by the agency and by all those who have applied to the agency for approval, does not put this case in the category required by Supreme Court Rule 19 for this Court to grant Certiorari. Certiorari should only be granted in those special cases which will have a broad effect upon the judicial system, upon the laws of the entire country. See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 Sup. Ct. 457, 1 L. Ed. 2d 511 (1957) and *Bickey* "The Least Dangerous Branch—The Supreme Court at the Bar of Politics" (1962).

CONCLUSION

The Tahoe Regional Planning Compact was entered into reluctantly by the neighboring states of Nevada and California. Each of the parties to the Compact unwillingly gave up a certain amount of sovereignty. They were not, however, willing to take the final step and allow the agency to acquire full sovereignty within the Basin. They reserved to themselves and to the local governmental bodies certain rights and provided that unless there was a dual majority to reject a project which ostensibly came within the ordinance, the project was approved. That is the clear language of the Compact, and that is the holding of the district court and the holding of the Circuit Court of Appeals. It is not something that this Court could or should

have the power to change. It is something that as the Ninth Circuit Court stated is "of the deliberate action by the legislatures of Nevada and California and the Congress of the United States". Those legislative bodies, having acted and having contracted in clear and binding language, it would serve no useful purpose for this Court to grant a petition for Certiorari.

The Court should recognize that the projects contemplated, while of small significance to the Tahoe Basin in terms of land area, are of substantial significance to the respondents in terms of their economic impact. They are also of some economic significance to the general area. See brief of Amicus Curiae, Sacramento-Sierra Building and Construction Trades Council. This matter has already once been before the court on the question of a bond to indemnify respondents Kahle and Jennings against losses occasioned by the injunction. California was given the opportunity to demonstrate its belief in the merits of its cause by posting a bond to indemnify the individuals who have already suffered great economic loss as a result of the delay, and failed to do so. To now grant a Writ of Certiorari would, in effect, delay the construction of the projects an additional length of time without any requirement of a bond by the State of California. This is so because the practical considerations of the respondents, and those who provide them financing, dictate that they not proceed until there is a final adjudication of this matter.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated, Reno, Nevada,
August 18, 1975.

BREEN, YOUNG, WHITEHEAD & HOY,
CHARTERED,
By DAVID R. HOY,
Attorneys for Respondent
Oliver Kahle.

(Appendices Follow)

Appendix A

In the United States District Court
for the District of Nevada

Honorable Bruce R. Thompson, Judge

Civil No. R-74-108

People of the State of California, ex rel.,
Evelle J. Younger, Attorney General,
Plaintiff,

vs.

Tahoe Regional Planning Agency,
Ted Jennings, Oliver Kahle,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reno, Nevada, Wednesday, August 14, 1974,
2:00 o'clock p.m.

Allan D. Bunnell,
Official Reporter.

RENO, NEVADA, WEDNESDAY, AUGUST 14, 1974,
2:00 O'CLOCK P.M.

THE COURT: Because of the time limitations involved in this case, it is not possible for a court to give the matter full treatment, so to speak; that is, to study and analyse all the authorities and write an opinion setting forth the Court's views regarding the law. That may or may not be unfortunate, because experience indicates that one of the causes of delay in legal procedures is the desire of a court to do a thorough job and make a full expression of its reasons for a decision in written form.

Because this is an application for an injunction to restrain action which is scheduled to be taken within a few days, it is important that the Court should render a decision promptly, and do the best it can on the basis of the material that has been presented.

I would like to say, however, that I have had the benefit of arguments and briefs from counsel who are obviously very knowledgeable in the field and have cogently expressed their arguments in support and in opposition to the motion for a preliminary injunction.

It probably would be proper to observe that many people—and I know not for what reason—in the United States have acquired the idea that you can go to court and obtain a decision in favor of their personal and individual idea of what is just and equitable in the premises. Such an attitude implies that the Court agrees with the litigant and that the Court's personal opinion is in accord with the litigant's view of what is just and equitable in the premises.

I can frankly state that if I should decide this case strictly on the basis of what I personally believe, what my personal predilections are, I would decide it in favor of the plaintiff, because I personally believe that a prolifera-

tion of hotel casinos on the shores of Lake Tahoe is some form of an abomination and it should be limited as much as possible. But so long as we in our great country adhere to the principle that we are under a government of laws and not of men, my personal opinions and predilections have very little to do with the subject.

The only reason that the plea of the State of California must fail in this particular case is because of the Legislature and Governor of the State of California, the Legislature and Governor of the State of Nevada, those in office at the time the respective acts of those respective legislatures which established the Compact for the Tahoe Regional Planning Agency were adopted, and the Congress of the United States which approved that Compact.

Any difficulties that the Tahoe Regional Planning Agency faces with respect to obtaining what it may well believe to be the true intent and purposes of the legislation are encountered because of what those people who agree with the position of the State of California would consider to be deficiencies in the Compact.

That Compact is the basic charter of this Agency; it is that Agency's constitution. The method of operating and the limitations upon its operations are governed entirely by that Compact; and the Agency itself has recognized that, because when it adopted rules and regulations, as it was authorized to do in implementation of the authority granted to it by the Compact, very carefully in every instance, that I have been able to observe, included in those rules and regulations the specific limitations on its powers which were set up in its own constitution; that is, the Compact itself.

There isn't anything I can add to the presentations of counsel with respect to those limitations. Article III of the Compact, which governs the organization of the Agency, Subsection (g), provides that:

> "A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the Agency."

So under that provision you have to have at least three representatives from California and three representatives from Nevada to constitute a quorum.

> "A majority vote of the members present representing each state shall be required to take action with respect to any matter."

I don't see anything equivocal, ambiguous or undertain about that provision. It is very specific. It provides, in clear and unambiguous terms, that a majority of the quorum present from each state has to agree before action can be taken.

On a numerical basis, the situation is even more stringent than suggested by counsel in their briefs, who assumed that there would always be a five-five membership present at an Agency meeting. But as I read this—and I see no room for disagreement—if you had three members of the quorum from Nevada present: five members, more than a quorum, from California present at one of those meetings, the vote of the two members from Nevada could stop effective action by the Agency.

No matter what anybody believes as to the usefulness of that sort of provision in a Compact of this kind, it is there; the Court can't change it. The only way it can be changed is by another joint action by the legislatures of the States of California and Nevada, submitted to the Congress of the United States for its approval.

The subsequent pertinent provision in the Compact, Subsection (k) of Article VI, is not properly characterized as simply a time limitation on action; it is obviously much

more than that. It is in the section of the Compact that specifies the powers of the Tahoe Regional Planning Agency. It provides:

> "Whenever under the provisions of this article, or any ordinance, rule or policy adopted pursuant thereto, the Agency is required to review or approve any proposal, public or private, the Agency shall take final action whether to approve, to require modification or to reject such proposal within sixty days after such proposal is delivered to the Agency. If the Agency does not take final action within sixty days the proposal shall be deemed approved."

And this language is reiterated in Section 4.32 of the Land Use Ordinance adopted by the Agency.

The stalemate in the Agency because of the Charter provision that there must be a majority vote from the quorum present from each state for action to be taken constitutes no action; it is not either approval, rejection or modification.

You wonder how this type of a Charter could have been adopted. Those who oppose these two applications for casino hotels may wonder how anyone in his right mind could set up a charter which contains that sort of a roadblock right in its own composition. It all stems, as I see it, from a lack of willingness on the part of two sovereign states; that is, the States of California and Nevada, to surrender to a bi-state agency a portion of the sovereignty of the particular state and its political subdivisions.

We have seen that same sort of thing on an international scale. When the Charter of the United Nations was negotiated in San Francisco—I think it was in 1948 or thereabouts—it was the United States that insisted on the veto power of one country in the Security Council, and

required that provision to be included in the Charter of the United Nations, because the United States of America did not want to surrender a portion of its sovereignty to the control of an international organization. We are all familiar with the result of that; a provision which over the years substantially impeded the activities of the United Nations because of vetoes exercised by one international power, which was not the United States of America.

We have something of the same situation existing here. It has been indicated that at least initially the State of California was willing to surrender a portion of its sovereignty to the bi-state agency, but acceded to a demand by the State of Nevada that the provision be included that action would be taken only on the approval of the majority of a quorum from each of the participating states. I don't know whether that is true or not, and I don't think it makes much difference, because whether or not one state or another state initiated the proposal, it is clear that both states agreed to it.

I think it also should be observed that I have found nothing in the Compact or in the regulations which requires approval by the Tahoe Regional Planning Agency of a permit in this situation. There are provisions in both the Compact and the regulations for a review of action taken by subordinate political subdivisions of each state involved in the administration and enforcement of the regulations and Compact of the Tahoe Regional Planning Agency, and authority in the Agency to reject any permits or authorizations granted by such subordinate agencies. I presume also that the Tahoe Regional Planning Agency could approve theoretically a proposal which had been rejected by Douglas County, for example, but I can't imagine how that question would ever get before the Agency, because all of the preliminary subordinate approvals must be obtained before

the Tahoe Regional Planning Agency, as the final arbiter, ever reviews the problem.

We are not here to implement what I think should be done for the future of Lake Tahoe; we are here to enforce the law that has been written. The only function of the Court is to interpret and enforce the provisions of the Interstate Compact and the regulations. For me there is no room for an interpretation. I think the provisions are clear, and I am required to comply with them.

We are in, really, the early stages of the control of the Lake Tahoe Basin, and there are many problems that have to be resolved. I do not anticipate that the decision of the Douglas County Commissioners and Planning Commission, the Nevada Lake Tahoe Agency in this particular case, presages an invitation to anyone, who thinks he can make a lot of money, to build another hotel casino at Lake Tahoe, at least I hope it doesn't.

In any event, the motion for a preliminary injunction is denied.

Mr. Breen, will you prepare an appropriate order?

MR. BREEN: I will, your Honor.

THE COURT: And have it in tomorrow.

MR. BREEN: I will, your Honor.

THE COURT: All right, we will stand adjourned.

UNITED STATES OF AMERICA,
DISTRICT OF NEVADA—ss.

I, ALLAN D. BUNNELL, Official Reporter for the United States District Court for the District of Nevada, do hereby certify that I was present and reported in Stenotype writing the proceedings had in the foregoing matter; that I thereafter reduced my said Stenotype notes to typewriting; that the foregoing transcript constitutes a full, true and correct partial transcript of the proceedings had therein.

Dated at Reno, Nevada, this 15th day of August, 1974.

/s/ ALLAN D. BUNNELL
Official Reporter.

Appendix B

AMENDED: June 11, 1975

United States Court of Appeals
for the Ninth Circuit

No. 74-2546

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. EVELLE J. YOUNGER,
Attorney General,
Plaintiff-Appellant,

vs.

TAHOE REGIONAL PLANNING AGENCY,
TED JENNINGS, OLIVER KAHLE,
Defendants-Appellees.

OPINION

[April 30, 1975]

Appeal from the United States District Court
for the District of Nevada

Before: KOELSCH and CHOY, Circuit Judges,
and KELLEHER,* District Judge.

CHOY, Circuit Judge:

The State of California appeals from the district court's refusal to grant a preliminary injunction to halt construction of two hotel-casinos in the Lake Tahoe Basin (the Basin). We affirm.

*Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

In order to protect the natural resources and ecological balance of the Lake Tahoe Basin[1] the states of California and Nevada in 1968 entered into a compact to create a regional agency with extensive powers to regulate and control development within the Basin. Cal. Govt. Code § 66801 (West Supp. 1975); Nev. Rev.Stat. §§ 277.190 et seq. (1973). The compact, known as The Tahoe Regional Planning Compact (the Compact), received the consent of Congress in December 1969. Public Law 91-148, 83 Stat. 360.

The Compact created the Tahoe Regional Planning Agency (TRPA), which was composed of five delegates from each state and one non-voting delegate representing the federal government. The TRPA was charged with responsibility for developing within ninety days a regional interim plan and, within eighteen months, a regional plan which would reflect a wide variety of economic, environ-

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1. Article I of the Compact states:

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title."

mental and social considerations. The Compact also directed the TRPA to adopt all ordinances, rules, regulations and policies necessary to effectuate the regional interim plan and the regional plan. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 518 (9th Cir. 1974).

Pursuant to its mandate, the TRPA adopted various procedural regulations and imposed certain land use, height and density restrictions applicable to developments in the Basin. If a builder wanted to develop more than 200 square feet of land or to erect certain types of structures, he was required first to seek a permit from the local permit-issuing authority (generally, the zoning authority of the county in which the construction was to take place). The permit-issuing authority, according to TRPA regulations, was required to adhere to the policies and land restrictions adopted by the TRPA but was granted the power to issue variance permits under certain circumstances.

Appellees Jennings and Kahle each applied for and was granted an administrative (special use) permit from the governing body of Douglas County, Nevada, for the construction of a hotel-casino. The Douglas County commissioners also granted a height variance whereby each appellee was permitted to construct his hotel-casino to a height greater than the forty foot limit allowed by TRPA's Land Use Ordinance. In granting the variances the commissioners, as required by Section 8.33 of the Land Use Ordinance, made a specific finding that the height variance for each hotel would be a benefit to the general welfare of the region. The projects were then submitted for approval to the Nevada Tahoe Regional Planning Agency, a state agency empowered to exercise environmental control over gaming establishments in the Nevada side of the Basin. The Nevada agency approved both projects.

Jennings and Kahle then submitted the special use and height variance permits to the TRPA for review, as required by Section 4.32 of the Land Use Ordinance. On July 25, 1974, following a hearing before the TRPA, a motion to approve both projects was made as well as a motion to deny both projects. The vote was as follows:

Motion to Approve Projects

	For	*Against*
California Delegates	0	5
Nevada Delegates	3	2

Motion to Deny Projects	*For*	*Against*
California Delegates	5	0
Nevada Delegates	2	3

Soon after the vote, Jennings and Kahle made plans to commence construction on their respective projects, California brought this action to enjoin construction, and the district court issued a temporary restraining order. After a hearing, however, it dissolved the order and denied California's motion for a preliminary injunction. The court's decision was based on its conclusion that the TRPA votes did not constitute "action" within the meaning of the Compact and that the TRPA's failure to take action resulted in the projects being deemed approved under Article VI(k) of the Compact.

Scope of Review

By arguing that the district court's decision may not be reversed unless it amounted to an abuse of discretion, the builders raised a threshold question relating to the scope of appellate review. Although it is a well-settled general rule that the grant or denial of an interlocutory injunction is a matter committed to the discretion of the district court,

that rule does not apply to cases where the court's action is erroneous as a matter of law. *See K-2 Ski Co. v. Head Ski Co., Inc.*, 467 F.2d 1087, 1088 (9th Cir. 1972). Since the district court's denial of the preliminary injunction was based solely upon its *legal* conclusions on the meaning of the TRPA Compact, its action is freely reviewable. *See Societe Comptoir De L'Industrie Colonniere Etablissements Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 35-36 (2d Cir. 1962).

"Final Action"

The unique issue raised by this appeal is whether, within the meaning of the Compact, no "final action" is taken by the TRPA on a proposal unless there is a majority vote by *each* state's delegation that the proposal presented is either approved, rejected, or modified. At the center of this controversy finding California and Nevada on opposite sides are two Compact provisions. Article III(g) provides:

> A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. . . .

And Article VI(k) provides:

> Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved.

According to California, Article III(g) is ambiguous and should be interpreted as follows:

> When a quorum is present and votes on a proposal, if that proposal does not receive a positive vote from the majority of both states then the proposal fails. That vote is final action and if that vote comes within 60 days after the proposal is submitted to the TRPA, Article VI(k) of the Compact with its 60 day provision is irrelevant.

Brief for Appellant at 12-13.

Appellees, on the other hand, emphasize the Article III language that a majority vote of the members representing each state shall be required to *"take action"* with respect to any matter. According to the builders, unless there is a dual majority vote either to approve, reject or modify a proposal, Agency "action" has not taken place and Article VI(k) comes into play even though a vote has been recorded. Appellees' interpretation would dictate that their projects be "deemed approved" under Article VI(k). This is so because the majority of each state's delegation on the TRPA failed either to approve or reject the projects. In other words, appellees suggest that under the statutory and regulatory scheme a "split vote" (i.e., a majority of one state's representatives voting one way and a majority of the other state's representatives voting another) should be considered a nullity, or at least not an "action" or "final action." The district court, finding the language of the two Articles unambiguous, adopted the appellees' view of the voting and approval procedure.

The entire dispute turns on the meaning of the words "action" in Article III(g) and "final action" in Article VI(k). The reason these simple terms have caused so much

difficulty is that appellees' interpretation is inconsistent with common parliamentary procedure. Generally, once a quorum is present, any vote by an organization on any proposal is considered "action." Thus, if there is a proposal on the floor for approval of a new meeting time, and it fails to gain a majority vote (e.g., the vote ends in a tie), "action" has been taken and the proposal is considered *rejected. See* Robert's Rules of Order Newly Revised § 43 (1970). Consistent with this parliamentary rule are numerous decisions by courts holding that tie votes by zoning boards or other governmental bodies have the effect of *denying* the proposals before them. *See, e.g., Sokolis v. Zoning Board of Appeals of Springfield,* 21 Ill. App. 2d 178, 157 N.E. 2d 427 (1959); *Montgomery County Board of Appeals v. Walker,* 288 Md. 574, 180 A.2d 865 (Ct. App. 1962). According to California, these cases indicate that it is absurd to argue that a split vote by the TRPA does not amount to a "denial" or at least "action". California, understandably, wants to avoid the situation where a significant construction project is "deemed approved" even though its proponents can muster no more than a bare majority of one state's delegation or quorum.

Although we find California's argument extremely appealing on an emotional level, it simply does not take into account the plain meaning of the Compact and the intent of its architects. California makes a critical error in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the provisions of the unique statutory scheme involved here, we must look not to Robert's Rules of Order or decisions dealing with tie votes by zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history.

What California fails to acknowledge fully is that the Compact and the TRPA are *sui generis* offsprings of a marriage between sovereign partners, each extremely reluctant to relinquish its sovereignty over a portion of its territory. The TRPA is a powerful planning agency with authority to establish minimum land use standards applicable throughout the Basin and to police the region to ensure compliance with the general plan and any ordinances passed. However, its sovereign creators did not envision it as a super bi-state zoning board whose approval would be a prerequisite to all land development,[2] or as an omnipotent board which could enforce its will over the majority vote of one state's delegation.[3]

The TRPA itself recognizes the limits of its authority and has even delegated some of the authority it has to local government entities. In promulgating the overall plans, regulations and procedures with respect to land use and development, the TRPA provided that the power to issue building permits (including special use and variance permits) remains in the hands of the local zoning authorities. *See* TRPA Land Use Ordinance § 4.10. The TRPA reserved for itself, with respect to permits, a limited *review* function. *See id.* at § 4.32. In other words, neither the statutory

2. Under the Compact, no building proposal need be reviewed and approved by the TRPA before construction except public works projects (and only those built by parties other than the State of California or Nevada.) Article VI(c).

3. It is clear from the legislative history of the Compact that Nevada, in particular, was extremely reluctant to relinquish much of its sovereignty over land use controls and planning. *See generally* Note, *Regional Government for Lake Tahoe*, 22 Hastings L.J. 705 (1971). For example, Nevada insisted that California eliminate from its law the provision that a simple majority vote of the TRPA quorum could take action on proposals. California acquiesced and adopted the "dual majority" provision, Article III(g).

nor regulatory scheme requires that a proposed project[4] gain the approval of the TRPA before it is built. This is so even if the project has been granted a variance from the general plan by the local permit-issuing authority. TRPA's Land Use Ordinance § 4.32 provides:

> Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon review of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the agency does not take final action within 60 days, the permit shall be deemed approved.

This important regulation is perfectly consistent with Articles III(g) and VI(k) and indicates, as the builders have argued, that "final action" does not take place unless the TRPA does one of three things: 1) approves the permit 2) requires modification or 3) rejects the permit. This regulation evidences TRPA's own construction of the disputed statutory provisions, and we should follow the construction by those charged with the statute's execution unless there are compelling indications that it is wrong. *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 421 (1973). We find no such indications.

Under the TRPA statutory and regulatory scheme, variance and use permits must be submitted for review to the TRPA, and the TRPA has broad discretion to reject or approve on the merits each building permit request. How-

4. The only exception being public works projects other than those built by the State of California or Nevada. *See* Article VI(c); note 2 *supra.*

ever, the TRPA's power of de novo review is fully exercised only when a dual majority for or against a proposal is reached.

When a split vote is registered, the TRPA assumes a different posture, and becomes more like an appellate court than a zoning board. If an appellate court cannot agree on a majority decision, then the lower body's decision stands affirmed—the rationale being that no "decision" has been reached by the higher authority. *Cf. State Department of Ecology v. City of Kirkland,* 84 Wash. 2d 25, 523 P.2d 1181, 1184 (1974). Similarly, in this case where no dual majority was mustered for either approval or rejection, we conclude that no "decision" was ever rendered nor "final action" ever taken by the TRPA. By virtue of Article VI(k) which provides in such a case that the project be deemed approved, the decision of the local permit issuing authority in effect stands affirmed.

Such a reading of the Compact, notwithstanding California's protestations to the contrary,[5] does not gut its provisions nor frustrate its purpose. The district court's interpretation of Articles III(g) and VI(k), which we affirm, gives effect to the statutory scheme carefully devised by two states reluctant to relinquish very much sovereignty. That the Compact may not be a powerful antigrowth measure in that it permits a majority of one state to stop effective action by the TRPA is not the result of a court imposed

5. California also argues that such an interpretation would allow construction of projects that are in blatant violation of the regional plan. Two responses are appropriate: First, the TRPA chose to vest variance-granting power in the local authorities and set up guidelines for them to follow; second and more important, if the local authorities violate the variance guidelines and other ordinances in granting permits, either state as well as the TRPA has the right to bring action in state or federal court seeking compliance with the regional plan and the TRPA's regulations. *See* Article VI(b).

terpretation but of deliberate action by the legislatures f Nevada and California and the Congress of the United tates. This court is not empowered to rewrite the Compact. alifornia's remedy lies solely with the legislative branches f the parties to the Compact.

AFFIRMED.

Appendix C

Public Law 91-148

AN ACT

To grant the consent of the Congress to the Tahoe regional planning compact, to authorize the Secretary of the Interior and others to cooperate with the planning agency thereby created, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe regional planning compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

"TAHOE REGIONAL PLANNING COMPACT

"Article I. Findings and Declarations of Policy

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the

region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is impertative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title.

"ARTICLE II. DEFINITIONS

"As used in this compact:

"(a) 'Region,' includes Lake Tahoe, the adjacent parts of the Counties of Douglas, Ormsby, and Washoe lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B. &M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

"(b) 'Agency' means the Tahoe Regional Planning Agency.

"(c) 'Governing body' means the governing board of the Tahoe Regional Planning Agency.

"(d) 'Regional plan' shall mean the long-term general plan for the development of the region.

"(e) 'Interim plan' shall mean the interim regional plan adopted pending the adoption of the regional plan.

"(f) 'Planning commission' means the advisory planning commission appointed pursuant to paragraph (h) of Article III.

"ARTICLE III. ORGANIZATION

"(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

"The governing body of the agency shall be constituted as follows:

"One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

"One member appointed by each of the boards of county commissioners of Douglas, Ormsby and Washoe counties. Any member so appointed shall be a resident of the county from which he is appointed and may be, but is not required to be:

"(1) A member of the board which appoints him; and

"(2) a resident of or the owner of real property in the region, as each board of county commissioners may in its own discretion determine. The manner of selecting the person so to be appointed may be further prescribed by county ordinance. A person so appointed shall before taking his seat on the governing body disclose all his economic interests in the region, and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. If any board of county commissioners fails to make an appointment required by this paragraph within 30 days after the effective date of this

act or the occurrence of a vacancy on the governing body, the governor shall make such appointment. The position of a member appointed by a board of county commissioners shall be deemed vacant if such member is absent from three consecutive meetings of the governing body in any calendar year.

"One member appointed by the Governor of California and one member appointed by the Governor of Nevada. The appointment of the California member is subject to Senate confirmation; he shall not be a resident of the region and shall represent the public at large. The member appointed by the Governor of Nevada shall not be a resident of the region and shall represent the public at large.

"The Administrator of the California Resources Agency or his designee and the Director of the Nevada Department of Conservation and Natural Resources or his designee.

"(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

"(c) The term of office of the members of the governing body shall be at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years.

"(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such

meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as 'the first Monday of each month,' and shall not change such date oftener than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date, place and agenda at least 5 days prior to the meeting.

"(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

"(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be two years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

"(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

"(h) An advisory planning commission shall be appointed by the agency, which shall consist of an equal number of members from each state. The commission shall include but shall not be limited to: the chief planning officers of Placer County, El Dorado County, and the City of South

Lake Tahoe in California and the Counties of Douglas, Ormsby, and Washoe in Nevada, the Placer County Director of Sanitation, the El Dorado County Director of Sanitation, the county health officer of Douglas County or his designee, the county health officer of Washoe County or his designee, the Chief of the Bureau of Environment Health of the Health Division of Department of Health, Welfare and Rehabilitation of the State of Nevada or his designee, the executive officer of the Lahontan Regional Water Quality Control Board or his designee, the executive officer of the Tahoe Regional Planning Agency who shall act as chairman and at least four lay members each of whom shall be a resident of the region.

"(i) The agency shall establish and maintain an office within the region. The agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

"(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken. Upon receipt of certified copies of the resolutions or notifications appointing the members of the governing body, the Secretary of State of each respective state shall notify the Governor of the state who shall, after consultation with the Governor of the other state, issue a concurrent call for the organization meeting of the governing body at a location determined jointly by the two governors.

"(k) Each state may provide by law for the disclosure or elimination of conflicts of interest on the part of members of the governing body appointed from that state.

"ARTICLE IV. PERSONNEL

"(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this act or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

"(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency, and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

"(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

"ARTICLE V. PLANNING

"(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to

its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this paragraph shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

"The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this paragraph.

"If a request is made for the amendment of the regional plan by:

"(1) a political subdivision a part of whose territory would be affected by such amendment; or

"(2) the owner or lessee of real property which would be affected by such amendment.

the governing body shall complete its action on such amendment within 60 days after such request is delivered to the agency.

"TAHOE REGIONAL PLAN

"(b) Within 15 months after the formation of the agency, the planning commission shall recommend a regional plan.

Within 18 months after the formation of the agency, the governing body shall adopt a regional plan. After adoption, the planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards, and elements of the regional plan.

"The regional plan shall include the following correlated elements:

"(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.

"(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to, freeways, parkways, highways, transportation facilities, transit routes, waterways, navigation and aviation aids and facilities, and appurtenant terminals and facilities for the movement of people and goods within the region.

"(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

"(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands,

parks and parkways, riding and hiking trails, beaches and playgrounds, marinas and other recreational facilities.

"(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

"In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region. Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private individuals.

"(c) All provisions of the Tahoe regional general plan shall be enforced by the agency and by the states, counties and cities in the region.

"TAHOE REGIONAL INTERIM PLAN

"(d) Within 60 days after the formation of the agency, the planning commission shall recommend a regional interim plan. Within 90 days after the formation of the

agency, the governing body shall adopt a regional interim plan. The interim plan shall consist of statements of development policies, criteria and standards for planning and development, of plans or portions of plans, and projects and planning decisions, which the agency finds it necessary to adopt and administer on an interim basis in accordance with the substantive powers granted to it in this agreement.

"(e) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan and interim plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

"(f) All provisions of the interim plan shall be enforced by the agency and by the states, the counties, and cities.

"ARTICLE VI. AGENCY'S POWERS

"(a) The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans. Every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. The regulations shall contain general, regional standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers; harbors, breakwaters; or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and

sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the interim or general plan.

"Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the interim plan or the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

"Interim regulations shall be adopted within 90 days from the formation of the agency and final regulations within 18 months after the formation of the agency.

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

"(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

"(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment.

"(b) All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

"(c) Except as otherwise provided in paragraph (d), all public works projects shall be reviewed prior to construction and approved by the agency as to the project's compliance with the adopted regional general plan.

"(d) All plans, programs and proposals of the State of California or Nevada, or of its executive or administrative agencies, which may substantially affect, or may specifically apply, to the uses of land, water, air, space and other natural resources in the region, including but not limited to public works plans, programs and proposals concerning highway routing, design and construction, shall be referred to the agency for its review, as to conformity with the regional plan or interim plan, and for report and recommendations by the agency to the executive head of the state agency concerned and to the Governor. A public works project which is initiated and is to be constructed by a department of either state shall be submitted to the agency for review and recommendation, but may be constructed as proposed.

"(e) The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules,

regulations and policies. If it is found that the general plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

"(f) Violation of any ordinance of the agency is a misdemeanor.

"(g) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

"(h) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

"(i) Whenever a new city is formed within the region, the membership of the governing body shall be increased by two additional members, one appointed by, and who shall be a member of, the legislative body of the new city, and one appointed by the Governor of the state in which the city is not located. A member appointed by the Governor of California is subject to Senate confirmation.

"(j) Every record of the agency, whether public or not, shall be open for examination to the Legislative Analyst of the State of California and the Fiscal Analyst of the State of Nevada.

"(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final

action within 60 days, the proposal shall be deemed approved.

"ARTICLE VII. FINANCES

"(a) Except as provided in paragraph (e), on or before December 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion not more than $150,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. Each county in California shall pay the sum allotted to it by the agency from any funds available therefor and may levy a tax on any taxable property within its boundaries sufficient to pay the amount so allocated to it. Each county in Nevada shall pay such sums from its general fund or from any other moneys available therefor.

"(b) The agency may fix and collect reasonable fees for any services rendered by it.

"(c) The agency shall be strictly accountable to any county in the region for all funds paid by it to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursements.

"(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds.

"(e) As soon as possible after the ratification of this compact, the agency shall estimate the amount of money necessary to support its activities:

"(1) For the remainder of the then-current fiscal year; and

"(2) If the first estimate is made between January 1 and June 30, for the fiscal year beginning on July 1 of that calendar year.

The agency shall then allot such amount among the several counties, subject to the restriction and in the manner provided in paragraph (a), and each county shall pay such amount.

"(f) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

"ARTICLE VIII. MISCELLANEOUS

"(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in paragraph (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

"(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it

from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

"(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

"(d) No provision of this compact shall have any effect upon the allocation or distribution of interstate waters or upon any appropriative water right."

SEC. 2. The Secretary of the Interior and the Secretary of Agriculture are authorized, upon request of the Tahoe Regional Planning Agency, to cooperate with said agency in all respects compatible with carrying out the normal duties of their Departments.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the Tahoe regional planning governing board.

SEC. 4. Any additional powers conferred on the agency pursuant to article VIII(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

SEC. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

SEC. 7. The right to alter, amend or repeal this Act is expressly reserved.

Approved December 18, 1969.

Appendix D

TAHOE REGIONAL PLANNING AGENCY ORDINANCE NO. 13

An Ordinance Amending Sections 1.00, 3.00, 5.10, 7.22, 7.82, 8.13, 8.25, 8.27, 8.28, 9.11, 9.12, 9.13, 9.14, 9.21, 9.22, 9.24, 9.30 and 9.31, and Adding a New Section Providing That Violations of the Provisions of the Ordinance Shall Constitute a Misdemeanor to Ordinance No. 4 as Amended by Ordinance No. 8, Entitled, "An Ordinance Establishing Regional Land Use Districts and Regional Land Capability Districts; Providing Population Density Controls and Land Coverage Limitations; Providing for the Issuance of Permits Concerning Land Uses, Structures and Land Coverage; Providing for Non-Conforming Alterations, Uses and Structures; Providing for Variances; and Providing for Other Matters Properly Relating Thereto."

The governing body of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

The governing body of the Tahoe Regional Planning Agency finds that in order to effectuate the adopted regional plan, it is necessary to adopt this ordinance establishing regional land use and land capability districts; providing population density controls and land coverage limitations;

providing for the issuance of permits concerning land uses, structures, and land coverage; providing for non-conforming alterations, uses and structures; providing that violations of the ordinance shall constitute a misdemeanor; providing for variances; and providing for other matters properly relating thereto. The governing body further finds that the provisions of this ordinance are in accordance with the provisions and purposes of the Tahoe Regional Planning Compact.

Section 2.00 General Provisions

2.10 *Compliance*

Land use, land coverage, and population density standards shall be in compliance with the terms of this Ordinance, and permits respecting same shall be granted or denied in conformity with the provisions of this Ordinance.

2.11 The provisions of this Ordinance establish the minimum standards applicable within the Region to the subject matters of the Ordinance. Any political subdivision may enforce equal or higher standards within its territory and this Ordinance shall not be deemed a limitation or repeal of any other powers granted to the governments of the Tahoe Region by the United States or the respective states.

2.20 *Interpretation and Severability*

The provisions of this Ordinance shall be liberally construed to effectuate their purposes. If any section, clause, provision or portion of this Ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

2.30 *Short Title*

This Ordinance may be cited and referred to as the Land Use Ordinance.

Section 3.00 Definitions

For the purposes of this Ordinance, certain terms or words used herein shall be interpreted as follows: Words in the present tense include the future; words in the singular number include the plural number, and words in the plural number include the singular number. The word "shall" is mandatory, not permissive, unless the context indicates that a directory meaning is intended.

Accessory Uses—A use, building or other facility customarily a part of any permitted use that is clearly incidental and secondary to the permitted use and which does not change the character of the permitted use, or affect other properties in the vicinity.

Administrative Permit—A permit issued by a permit-issuing authority in accordance with its procedures to enable special consideration of whether a use, activity, building, structure, height, land coverage or other aspect of use or development will be permitted under the provisions of this Ordinance.

Agency — The Tahoe Regional Planning Agency.

Building—Any structure built and maintained for the support, shelter, or enclosure of persons, animals, or property of any kind.

Bulk Storage—Activities and uses with associated structures devoted to the storage of products and substances in bulk quantities such as lumber, oil, gasoline, building materials, and vehicles, and warehouses for consumer and other products.

Child Care Nurseries—Buildings and other structures, and land, designed to be used for the care of four or more children, with or without compensation.

Collective Household—A group of at least two, but not more than six, persons who are unrelated by blood, marriage or adoption, living together as an independent housekeeping unit.

Commercial, General—The retail or wholesale sale or rental of any article, substance or commodity, including building materials and vehicles and the provision of all commercial services including financial institutions and personal commercial services.

Commercial, Limited—The retail sale or the rental of any consumer article, substance or commodity, but not including service stations and establishments for the sale of building materials other than hardware, automotive vehicles, and other items of significant size and prominence that are normally displayed or stored outside of a building. Also, the provisions of personal commercial services such as barber shops, beauty shops, photography studios, dry cleaners, and laundries.

Cultural Facilities—Uses, and facilities such as libraries, museums, art galleries, auditoriums, zoological gardens, historic sites and monuments.

Organized Recreation Camps—Land or premises containing structures designed to be used for organized camping.

Outdoor Amusement Facilities — Outdoor amusement facilities are those that characteristically contain a high proportion of structures, improvements and land

coverage in relation to uncovered land, machines and other devices, and are designed to be used by a large number of persons in relation to land area.

Outdoor Recreation—Uses and facilities pertaining to recreation activities that are carried on primarily outside of structures.

Outdoor Recreation Concessions—Uses and facilities ancillary to outdoor recreation uses, such as gasoline pumps at piers and marinas, and boat rental and food and beverage facilities at public beaches.

Overhead and Underground Utilities—Electric power transmission lines, telephone lines, and any other pipes or conduit and appurtenances used for the transmission of gas, water, sewage, or any other substance.

Parcel—An area of contiguous land owned by a person.

Permit-Issuing Authority—The local government within the territory of which the land use district, land capability district, proposed construction, use or land coverage is located, which government has the authority and obligation to enforce the standards established by this Ordinance.

Person—An individual, partnership, corporation, business association, or group of individuals and any governmental entity.

Private Recreation Areas—Land or premises designed to be used exclusively by owners and renters of single family dwelling units and their guests, and occupants of transient dwelling units or multiperson dwellings, that contain such facilities as tennis courts, playfields, swimming pools, clubhouses, bathing beaches, and piers.

Professional Office—An office for the conduct of professional services such as: accounting, advertising, architectural, legal counsel, drafting, dental, engineering, insurance, medical, and real estate. Professional services do not include activities normally involving animals, commercial vehicles or intensive patronage by the general public such as veterinary, general contracting, barber shops, beauty parlors, and pharmacies.

Public and Quasi-Public—Uses and facilities pertaining to communication, transportation, utilities, public services and education, including fire and police protection facilities, cultural facilities, religious facilities, schools, medical facilities, post offices, telephone, telegraph, television and radio systems, gas and electric systems, water, sewage, and disposal systems.

Quarry—Buildings, structures and land used for the removal of rock, sand, gravel,

soil, aggregates and the like for sale or for use in connection with development activity elsewhere.

Recreation Vehicle Park—A parcel of land under one ownership which has been planned and improved and which is let or rented or used for the temporary placement of camp trailers and camping vehicles which are utilized for non-permanent residential use.

Transient Dwelling Units—One bedroom or a group of two or more rooms containing no more than one bedroom, and designed to be rented primarily by the day or week and to be occupied temporarily by one or more individuals whose permanent residence is elsewhere. Hotels and motels normally contain transient dwelling units.

Transportation Facility—Buildings, structures and land used for such purposes as bus terminals, railroad stations, and motor vehicle freight terminals, but not including airports or heliports.

Undeveloped Campgrounds—Land or premises designed to be used for temporary occupancy by campers traveling by foot or horse which may contain such facilities as fireplaces, but do not contain such facilities as are provided at Developed Campgrounds.

Water Crossing or Diversion Structures—Any structure designed to alter or cross any stream, river or other body of water.

Section 4.00 Permit Procedure

4.10 *When Required*

No person shall undertake or carry out any of the following activities without first obtaining a permit from the permit-issuing authority:

(1) Any construction or use involving the creation of land coverage on an area greater than 200 square feet;

(2) any construction or use for which an administrative permit or variance permit as required by this Ordinance must first be issued by the permit-issuing authority.

4.20 *Application Form*

4.21 Applicants for permits shall submit the application and information required to the permit-issuing authority which shall review the application in accordance with the requirements of this Ordinance, and recommend any changes which are necessary to satisfy the standards established by this Ordinance. No permit shall be issued unless there is compliance with all the requirements of this Ordinance.

4.22 *Information Required*

Applicants for permits required under Section 4.10(2) shall furnish a Land Capability Report prepared by a person or firm qualified by training and experience to have expert knowledge of the subject. The permit-issuing authority shall determine the adequacy of the Report and may require the submission of further information where necessary. The Report shall contain information as provided in Section 8.27 to the extent necessary to show that the standards required for the particular administrative permit or variance permit sought by the applicant have been satisfied and any other information required by this Ordinance and by the adopted Rules and Regulations of Practice and Procedure of the Agency.

4.30 *Agency Review of Permits*

4.31 Permits required pursuant to Section 4.10(1), and any other permit required by the permit-issuing authority but not required by this Ordinance, shall become final without the necessity of review by the Agency, *provided, however,* that the fact that a permit becomes final without the necessity of review by

the Agency shall not foreclose any judicial action authorized by the Tahoe Regional Planning Compact to enforce the provisions of this Ordinance.

4.32 Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon *review* of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the Agency does not take final action within 60 days, the permit shall be deemed approved.

4.33 When an application for a permit is received by the permit-issuing authority, it shall immediately notify the Agency in writing of the following: (1) the fact that an application has been received; (2) the type of permit for which the application is made; and (3) the nature, scope and location of the construction, use, or land coverage proposed. Upon receipt of such documents, the Executive Director of the Agency and its

staff shall cooperate with the permit issuing authority when requested to do so by the permit-issuing authority in interpreting and applying the standards of the Ordinance to the construction, use or land coverage for which the permit application has been made.

4.34 The permit-issuing authority shall notify the Agency of all permits issued by it for any construction or use within the Lake Tahoe region. All permits issued and reported to the Agency shall be reviewed by the Agency staff, and all permits required pursuant to Section 4.10(2) shall be reported by the staff with staff recommendations to the governing body of the Agency for its review and action as provided in Section 4.32. The staff report and recommendations shall be available to the public at least 5 days prior to the meeting of which the permit issued pursuant to Section 4.10(2) is reviewed by the Agency. Reference to the permit shall be made in the agenda of such meeting and the applicant and other interested persons shall be afforded opportunity at such meeting to comment on the permit.

Section 5.00 Nature of Regional Land Use Ordinance

5.10 This section is descriptive and not directory and is only intended to explain in general terms the nature and operation of this Regional Land Use Ordinance which consists of the establishment of ten use districts in conjunction with seven land capability districts within the territory of the Lake Tahoe region.

5.20 This Ordinance includes regulations concerning the uses permissible within each of the ten use districts, and concerning the permissible amounts of land coverage which may be created in connection with any development within each of the seven land capability districts.

(3) In the case of an application pursuant to Section 8.25(3), the Land Capability Report need establish only that standards of that section have been satisfied.

8.28 *Additional Land Coverage—Variance*

Land coverage in excess of that permitted in any Land Capability District, up to the maximums stated in this Section, may be authorized by a variance permit issued by the permit-issuing authority, where a literal enforcement of the Ordinance deprives such property or privileges

enjoyed by other property in the vicinity and within the same Land Capability District, and the applicant shows that he cannot make any reasonable use of his property if such regulations are applied. Where such conditions are found, the additions permitted shall be the minimum departure from existing maximums reasonably necessary to avoid the deprivation of privileges enjoyed by such other property and to facilitate a reasonable use, and which will not create significant probabilities of substantial harmful environmental consequences. In no case may a variance permit be granted that provides the applicant with any special privileges not enjoyed by other properties in the vicinity. The maximum permissible additions shall not exceed 100% of the limits on land coverage in Land Capability districts 1, 2 and 3, and 10% of the limits on land coverage in Land Capability districts 4, 5, 6 and 7, as set forth in Section 6.20.

8.30 *Effects of Establishing Use Districts*

8.31 Except as provided hereinafter, no person shall, and the permit-issuing authority shall not permit any per-

son to erect any buildings; move, alter, add to, or enlarge any existing building; use, designate, or intend to use for any purpose any land, building or premises in any manner other than is included among the uses listed as permitted in the Use District in which such building, land, or premises is located.

8.32 *Calculation of Densities*

The number of dwelling units per acre permitted in a Rural Estate, Low, Medium or High Density Residential, and Tourist Commercial District, and transient dwelling units per acre permitted in a Tourist Commercial and Commercial District, shall be determined in the first instance on the dwelling units per acre permitted in the Use District in which the land is located. Such number of permitted dwelling units per acre may be limited below the maximums expressed by virtue of the limitations on land coverage applicable within the Land Capability District within which the land is located. In addition to the foregoing, the area upon which the appropriate density calculation is based shall not include existing bodies of water such

as lakes and ponds. Densities up to 10% in excess of the maximums permitted may be authorized by the permit-issuing authority where the applicant's plans provide for a total amount of land coverage, as calculated in accordance with Sections 8.22 and 8.23, 5% or more below the baseline maximums established for the Land Capability Districts within which the land is located, and it is determined that increase in density will not cause substantial problems of traffic congestion or inadequacy of public services.

FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-136

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. EVELLE J. YOUNGER,
Attorney General,
Petitioner,

vs.

TAHOE REGIONAL PLANNING AGENCY,
TED JENNINGS and OLIVER KAHLE,
Respondents.

BRIEF OF RESPONDENT TED JENNINGS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT TED JENNINGS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

QUESTION PRESENTED

Under the provisions of the Tahoe Regional Planning Compact and the Land Use Ordinance adopted by the Tahoe Regional Planning Agency (hereinafter TRPA), when the TRPA, in reviewing a private construction proposal, does not, within sixty (60) days, reach a "majority vote of the members present

representing each state" to either approve, modify or reject that proposal, is that proposal "deemed approved"?

II

STATUTES INVOLVED

This case involves an interpretation of the TRPA Land Use Ordinance (relevant portions of which are set forth in Appendix A) and the TRPA Compact, Public Law 91-148, 83 Stat. 360 (1969) (Pet. Appendix C).

While other provisions are involved, the case primarily involves a reading of §4.00 of the Land Use Ordinance and Article III(g) and Article VI(k) of the Compact.

Article III(g) (the "dual majority" provision) of the Compact provides as follows:

> "A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

Article VI(k) (the "60 day rule") of the Compact provides as follows:

> "Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required

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to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved."

III

STATEMENT OF THE CASE

The resolution of this case will not be found in quotations from Mark Twain, excerpts from Senate reports or legislative findings and declarations. Instead, the clear, unequivocal and unambiguous language of the Compact and the Land Use Ordinance are determinative. Indeed, in denying Petitioner's motion for a preliminary injunction, the District Court found the language so clear and certain that "there is no room for an interpretation." The Ninth Circuit Court of Appeals affirmed based on the "plain meaning of the Compact and the intent of its architects."

The basic facts are not in dispute. Respondent Jennings filed an application for an administrative permit with the "permit-issuing authority" as designated by the TRPA Land Use Ordinance. In the present case the "permit-issuing authority" was the Board of Commissioners of Douglas County, Nevada. After an extensive hearing, the Douglas County Commissioners, by unanimous vote, granted Jennings an administrative permit and made specific findings that

the project was in conformance with all TRPA ordinances and would create substantial environmental benefits on the land involved and to other lands in the area. Pursuant to the TRPA Land Use Ordinance, the TRPA permit-issuing authority also granted a height variance, specifically finding that such additional height would better promote protection of the environment of the area.[1]

The Jennings project was then submitted for review to the Nevada Tahoe Regional Planning Agency (hereinafter NTRPA), a Nevada State Agency authorized and empowered to exercise environmental controls over gaming establishments on the Nevada side of the Tahoe Basin.[2] Nevada Revised Statutes §278.780 et. seq. The NTRPA approved the Jennings project.

---

[1]Appellant's statement that Respondent's project will have serious long-term adverse environmental effects is not only totally irrelevant to this action, but is completely untrue. The Board of Commissioners of Douglas County, and the Nevada TRPA both found Respondent's project to be in compliance with all ordinances and environmental regulations of Douglas County and the TRPA, and that it would not have any adverse environmental consequences. In addition, the Nevada State Bureau of Environmental Health, which is in charge of regulating air and water quality throughout Nevada, approved this project and found that it met or exceeded all applicable water and air quality standards. The standards applied by the Bureau of Environmental Health are more stringent than the Standards of both the State of California and the Federal government.

[2]There is a serious question as to whether the TRPA even has jurisdiction to review gaming projects in light of Article VI(a) of the Compact which mandates that any business or recreational establishment which is required by state law to be individually licensed (such as a gaming establishment) and which is to be constructed on land so zoned in 1968 (Respondent's land was so zoned) is a permitted and conforming use under every plan, ordinance, rule, regulation or policy of the TRPA. This issue will be presented to the District Court should this action proceed.

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Thereafter, on June 13, 1974, the administrative and variance permits granted by Douglas County and approved by the NTRPA were submitted to the TRPA for review pursuant to §4.32 of the Land Use Ordinance. On July 25, 1974 the Jennings permit application came on for hearing before the TRPA. After an extensive hearing wherein evidence and testimony were presented, a motion was made to approve the Jennings permits. A majority of the Nevada representatives voted in favor of this motion (3-2) and a majority of the California representatives present voted against this motion (5-0). A motion was then made to reject the Jennings permits. A majority of the Nevada representatives present voted against this motion (3-2) and a majority of the California representatives present voted in favor of this motion (5-0). Thus, the TRPA did not approve or reject the Jennings project by a majority vote of the members present representing each state (i.e., a "dual majority").

In accordance with the established practice of the TRPA and the clear language of the Compact and Land Use Ordinance, this vote resulted in no action to approve, modify or reject being taken and the proposal was therefore "deemed approved" after the expiration of 60 days. Compact Articles III(g) and VI(k); Land Use Ordinance §4.32. This appeal challenges the TRPA's own long-standing interpretation of its own Ordinance, and of the Compact.

IV

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Ninth Circuit Court of Appeals' decision in this case is not in conflict with a decision of another court of appeals or with any law of the states of Nevada or California or with any decision of this Court; neither has the Ninth Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the supervision of this Court. California's only apparent basis for a writ of certiorari is that the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 19(b).

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1. PETITIONER'S CASE IS WITHOUT MERIT

California is not asking for an interpretation of the TRPA Compact, but rather that the express provisions and intent of the Compact be ignored. California's position is not only inconsistent with the long-standing practice of the TRPA (which is entitled to judicial deference, absent compelling circumstances, *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973)), it defies the express language of the Compact and the Land Use Ordinance.

Compact Article III(g) provides, in as clear a statement as the English language allows, that a majority vote of the members representing each state (i.e., a dual majority vote) is necessary to take action with respect to any matter. Compact Article VI(k)

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provides in equally clear language, that in reviewing a proposal the TRPA must not only take action, but it must take final action to approve, modify or to reject within 60 days.

In the present case the TRPA did not obtain a dual majority vote and was therefore unable to take final action to approve, modify ar reject. California contends that this failure to take action amounts to final action to reject the proposal. However, just such a circumstance was contemplated by the Compact's draftsmen and an express provision was made therefor Article VI(k), the existence of which California refuses to acknowledge, provides that when the TRPA does not take final action to approve, modify or reject (by failing to reach a dual majority vote or otherwise), the proposal "shall be deemed approved." California would have this Court interpret "approved" to mean "rejected."

California states that the second sentence of Article III(g) establishes "the requisite vote which must be recorded for any proposal to be passed or adopted in the name of the body." (Pet., page 17). Such a characterization of Article III(g) is, at best, misleading. Article III(g) establishes the necessary vote to take action with respect to any matter, which certainly would include the taking of final action to approve or reject in reviewing a permit. The present case does not involve the adoption by the TRPA of anything; rather this case involves a review by the TRPA of a permit that was issued by the duly authorized permit-issuing authority.

California contends that a dual majority vote is required only to approve a permit that has been issued by the permit-issuing authority, and if no dual majority is received to approve, then the permit is rejected, even though there was no dual majority vote to reject. California, thus, argues that a permit can be rejected without a majority vote of the TRPA members representing each state. Yet, Article III(g) requires a dual majority vote to take action on any matter. Therefore, under California's interpretation a project can be rejected without the TRPA taking action. This is directly contrary to Article VI(k) which provides that if action is not taken, the project is deemed approved.

The effect of the failure of the TRPA to reject or approve by a dual majority vote is the same as if the TRPA had never voted, to-wit: no action is taken. When no action is taken the proposal as affirmatively approved by the permit-issuing authority is deemed approved. Compact Article VI(k).

Reading the Compact in accordance with its clear language does not return the region to the pre-Compact era. Prior to the TRPA each of the several counties surrounding Lake Tahoe had its own zoning and land use regulations and master plan. The primary purpose of the TRPA was to adopt a uniform basin-wide land use plan so that development of the Tahoe basin would proceed in accordance with a single master plan. The land use regulations adopted by the TRPA set the minimum standards in the Tahoe basin and supersede all existing regulations of the counties,

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unless the county regulation is more restrictive. Compact Article VI(a). The counties are mandated by the Compact to comply with and enforce the regulations and standards of the TRPA. Compact Article VI(b). The TRPA Land Use Ordinance, which designates the counties as the permit-issuing authority, also mandates compliance with the TRPA master plan. (Land Use Ordinance §§ 2.00, 8.30). All development within the Tahoe basin must be in accordance with the TRPA basin-wide master plan.[3]

California's suggestion that one state could approve strip mining in the other state over the other state's objection is absurd. No construction or development is allowed in the Tahoe basin if it does not comply with the TRPA master plan and Land Use Regulations. If a project is not in compliance with the TRPA master plan, the local government permit-issuing authority could not approve it. In most cases, projects must also be approved by either the California Tahoe Regional Planning Agency or the Nevada TRPA prior to review by the TRPA. In addition, projects must comply with all applicable state and federal environmental laws.

The California Attorney General continually infers that the public officials charged with the enforcement of the Compact will breach their public trust and violate the law in issuing permits. However, if a county board of commissioners issues a permit that is in

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[3]The subject property is zoned "Tourist Commercial" under the TRPA Land Use Ordinance; a hotel-casino is a permitted use in a Tourist Commercial classification.

violation of the TRPA regulations, any injured party could seek judicial review to set that illegal action aside, just as judicial review is available to insure that every public official performs his duty in accordance with the law. The present case is not, however, seeking any such judicial review of the action of Douglas County, the permit-issuing authority. Apparently, the California Attorney General feels that he is unique among public officials, in that only he can be trusted to perform his duty in accordance with the law. The within action certainly dispels that myth, since the California Attorney General is seeking to have the law enforced as he thinks it ought to be, rather than as it is written.

Both the District Court and the Ninth Circuit Court of Appeals indicated in no uncertain terms that the Compact must be enforced as it is written and that the Court was not empowered to rewrite the Compact. The legislatures of the states of Nevada and California and the Congress of the United States and the TRPA, in their collective legislative wisdom, determined that when the TRPA was unable to reach a dual majority vote in reviewing a proposal that has been approved by the permit-issuing authority, that proposal is deemed approved. California is asking this Court for legislative rather than judicial relief.

2. THE DETERMINATION OF THIS CASE IS NOT EVEN DEPENDENT UPON FEDERAL LAW, MUCH LESS ON IMPORTANT QUESTION OF FEDERAL LAW.

The outcome of this case is, to a significant extent, dependent upon the language of the TRPA Land Use Ordinance rather than the Compact. Both the District Court and the Ninth Circuit relied on and emphasized this Ordinance. Indeed, the issue which California now contends is critical, i.e., whether the TRPA's review is "appellate" or "de novo," is dependent entirely on an interpretation of the Land Use Ordinance. That this action is based on the TRPA Land Use Ordinance is evidenced by California's attempt to rely on the Petition for Rehearing filed by the TRPA which primarily consists of a detailed analysis of the provisions of the Land Use Ordinance.

Based upon the language of the Ninth Circuit, in the case *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517 (1974), Cert. den. ..... U.S. ....., 43 L.Ed.2d 654 (March 17, 1975), the United States District Court for the District of Nevada recently held that the TRPA ordinances are not laws of the United States and do not raise federal questions. *League to Save Lake Tahoe v. B.J.K. Corporation*, Civ.No. 7587BRT[4]. Thus, the TRPA Land Use Ordinance, on which California's claim primarily relies, is not even a federal law, must less of sufficient federal import to warrant review by this Court.

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[4]This case has been appealed to the Ninth Circuit Court of Appeals.

3. THERE IS NO IMPORTANT FEDERAL QUESTION

The interpretation of the dual majority provision of the TRPA Compact is not of great federal significance. Indeed, this Court recently denied certiorari on the question of whether the Compact is a law of the United States so as to confer federal jurisdiction, which surely is of greater federal import than an interpretation of specific provisions of that Compact. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517 (1974), Cert. den. ..... U.S. ....., 43 L.Ed. 2d 654 (March 17, 1975).

California indicates that this is an interstate controversy and this Court should resolve this dispute between Nevada and California. However, the State of Nevada is not a party to this action. Indeed, if this were a controversy between the two states, then neither the District Court nor the Court of Appeals would have jurisdiction. 28 USC 1251(a)(1).

California attempts to place great significance on the interstate aspects of this case, calling it "an action unprecedented in our multi-state republic." (Pet., page 8). However, the parties to this action are of no legal significance. This is simply a case of interpretation of the language of the TRPA Compact and the Land Use Ordinance adopted pursuant thereto. California as a party to the Compact certainly has standing to seek enforcement and interpretation of the Compact. California's standing or authority to bring the within action has never been challenged and is not in issue. The only thing unprecedented about this case is that California would not ask this Court to review a case that so totally lacks merit.

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4. THE NATURE OF THE TRPA REVIEW IS OF NO CONSEQUENCE

California argues that the "crux" of this case is the pseudo-issue of whether the review conducted by the TRPA is de novo or appellate in nature, as if the language of the Compact somehow changes when the review is de novo. The nature of the TRPA review is determined exclusively by the Land Use Ordinance, which is not even federal law. *League to Save Lake Tahoe v. B.J.K. Corporation, supra.*

California's reliance on the TRPA's Petition for Rehearing is misplaced. The TRPA did argue that based on the Land Use Ordinance, the nature of its review is de novo; however, the TRPA did not contend that the nature of the review, in any way, affected the ultimate decision. The TRPA expressly recognized that the Ninth Circuit based its determination on the "action" and "voting" provisions of the Compact. The TRPA only asked for a clarification or modification of the language of the opinion rather than the result. The TRPA has, since its inception, interpreted the provisions of the Compact and Land Use Ordinance with respect to what constitutes "final action" contrary to California's position herein, even though the TRPA believes that it conducts a de novo review. It is therefore apparent that the TRPA does not place any significance on the nature of the review with respect to what constitutes final action to approve, modify or reject. California asks this Court to defer to the TRPA's interpretation of the Compact and Ordinance only when that interpretation is convenient to its position.

Regardless of the type of review, the Compact still requires a dual majority vote to take action on any matter and if there is no action to approve, modify or reject within 60 days, then the proposal is deemed approved. Section 4.00 et seq. of the Land Use Ordinance provides that permits shall be issued by the permit-issuing authority. Whether the review subsequently undertaken by the TRPA is de novo or appellate, if the TRPA does not take action to reject that permit by a majority vote of the members of each state (the only way that the TRPA can take action) then the permit issued by the permit-issuing authority is deemed approved. The TRPA cannot void the permit issued by Douglas County without a dual majority vote to reject that permit. The opinions of the District Court and the Court of Appeals are clearly based on the language of the Compact rather than the nature of the TRPA review.

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5. THIS COURT HAS BY IMPLICATION REJECTED THE MERITS OF THIS CASE

Both the District Court and the Ninth Circuit required California to post a $3.5 million dollar bond as a condition of an injunction pending appeal. California sought relief from this Court on the basis that it had a strong likelihood of success on the merits and that it was going to file a petition for writ of certiorari on the question of the validity of said bond. *California v. TRPA*, Sup. Ct. No. A-422. Despite its representation to this Court, California did not file

said petition for writ of certiorari; neither did California prevail on the merits.

California presented the merits of this case in its motion to The Honorable Justice William O. Douglas. Justice Douglas initially enjoined respondents pending the filing of responses. After respondents filed their responses, which were in part addressed to the merits of the within appeal, Justice Douglas ruled that California must post the $3.5 million dollar bond as a condition of an injunction pending appeal. Justice Douglas's order, rejected, by implication if not directly, California's position on the within appeal. A further review of this case by this Court would serve no purpose.

V

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should deny petitioner's Petition for Writ of Certiorari.

Dated, Reno, Nevada,
August 20, 1975.

McDONALD, CARANO, WILSON,
BERGIN & BIBLE,
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(Appendix Follows)

Appendix

TAHOE REGIONAL PLANNING AGENCY ORDINANCE NO. 13

An Ordinance Amending Sections 1.00, 3.00, 5.10, 7.22, 7.82, 8.13, 8.25, 8.27, 8.28, 9.11, 9.12, 9.13, 9.14, 9.21, 9.22, 9.24, 9.30 and 9.31, and Adding a New Section Providing That Violations of the Provisions of the Ordinance Shall Constitute a Misdemeanor to Ordinance No. 4 as Amended by Ordinance No. 8, Entitled, "An Ordinance Establishing Regional Land Use Districts and Regional Land Capability Districts; Providing Population Density Controls and Land Coverage Limitations; Providing for the Issuance of Permits Concerning Land Uses, Structures and Land Coverage; Providing for Non-Conforming Alterations, Uses and Structures; Providing for Variances; and Providing for Other Matters Properly Relating Thereto."

The governing body of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

The governing body of the Tahoe Regional Planning Agency finds that in order to effectuate the adopted regional plan, it is necessary to adopt this ordinance establishing regional land use and land capability districts; providing population density controls and land coverage limitations; providing for the issuance of permits concerning land uses, structures, and land coverage; providing for non-conforming alterations, uses and

structures; providing that violations of the ordinance shall constitute a misdemeanor; providing for variances; and providing for other matters properly relating thereto. The governing body further finds that the provisions of this ordinance are in accordance with the provisions and purposes of the Tahoe Regional Planning Compact.

Section 2.00 General Provisions

2.10 *Compliance*

Land use, land coverage, and population density standards shall be in compliance with the terms of this Ordinance, and permits respecting same shall be granted or denied in conformity with the provisions of this Ordinance.

2.11 The provisions of this Ordinance establish the minimum standards applicable within the Region to the subject matters of the Ordinance. Any political subdivision may enforce equal or higher standards within its territory and this Ordinance shall not be deemed a limitation or repeal of any other powers granted to the governments of the Tahoe Region by the United States or the respective states.

2.20 *Interpretation and Severability*

The provisions of this Ordinance shall be liberally construed to effectuate their purposes. If any section, clause, provi-

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sion or portion of this Ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

2.30 *Short Title*

This Ordinance may be cited and referred to as the Land Use Ordinance.

Section 3.00 Definitions

For the purposes of this Ordinance, certain terms or words used herein shall be interpreted as follows: Words in the present tense include the future; words in the singular number include the plural number, and words in the plural number include the singular number. The word "shall" is mandatory, not permissive, unless the context indicates that a directory meaning is intended.

Accessory Uses—A use, building or other facility customarily a part of any permitted use that is clearly incidental and secondary to the permitted use and which does not change the character of the permitted use, or affect other properties in the vicinity.

Administrative Permit—A permit issued by a permit-issuing authority in accordance with its procedures to enable special consideration of whether a use, activity, building, structure, height, land coverage

or other aspect of use or development will be permitted under the provisions of this Ordinance.

Agency — The Tahoe Regional Planning Agency.

Building—Any structure built and maintained for the support, shelter, or enclosure of persons, animals, or property of any kind.

Bulk Storage—Activities and uses with associated structures devoted to the storage of products and substances in bulk quantities such as lumber, oil, gasoline, building materials, and vehicles, and warehouses for consumer and other products.

Child Care Nurseries—Buildings and other structures, and land, designed to be used for the care of four or more children, with or without compensation.

Collective Household—A group of at least two, but not more than six, persons who are unrelated by blood, marriage or adoption, living together as an independent housekeeping unit.

Commercial, General—The retail or wholesale sale or rental of any article, substance or commodity, including building materials and vehicles and the provision of all commercial services including financial institutions and personal commercial services.

Commercial, Limited—The retail sale or the rental of any consumer article, substance or commodity, but not including service stations and establishments for the sale of building materials other than hardware, automotive vehicles, and other items of significant size and prominence that are normally displayed or stored outside of a building. Also, the provisions of personal commercial services such as barber shops, beauty shops, photography studios, dry cleaners, and laundries.

Cultural Facilities—Uses, and facilities such as libraries, museums, art galleries, auditoriums, zoological gardens, historic sites and monuments.

Organized Recreation Camps—Land or premises containing structures designed to be used for organized camping.

Outdoor Amusement Facilities — Outdoor amusement facilities are those that characteristically contain a high proportion of structures, improvements and land coverage in relation to uncovered land, machines and other devices, and are designed to be used by a large number of persons in relation to land area.

Outdoor Recreation—Uses and facilities pertaining to recreation activities that are carried on primarily outside of structures.

Outdoor Recreation Concessions—Uses and facilities ancillary to outdoor recreation uses, such as gasoline pumps at piers and marinas, and boat rental and food and beverage facilities at public beaches.

Overhead and Underground Utilities—Electric power transmission lines, telephone lines, and any other pipes or conduit and appurtenances used for the transmission of gas, water, sewage, or any other substance.

Parcel—An area of contiguous land owned by a person.

Permit-Issuing Authority—The local government within the territory of which the land use district, land capability district, proposed construction, use or land coverage is located, which government has the authority and obligation to enforce the standards established by this Ordinance.

Person—An individual, partnership, corporation, business association, or group of individuals and any governmental entity.

Private Recreation Areas—Land or premises designed to be used exclusively by owners and renters of single family dwelling units and their guests, and occupants of transient dwelling units or multiperson dwellings, that contain such facilities as tennis courts, playfields, swimming pools, clubhouses, bathing beaches, and piers.

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Professional Office—An office for the conduct of professional services such as: accounting, advertising, architectural, legal counsel, drafting, dental, engineering, insurance, medical, and real estate. Professional services do not include activities normally involving animals, commercial vehicles or intensive patronage by the general public such as veterinary, general contracting, barber shops, beauty parlors, and pharmacies.

Public and Quasi-Public—Uses and facilities pertaining to communication, transportation, utilities, public services and education, including fire and police protection facilities, cultural facilities, religious facilities, schools, medical facilities, post offices, telephone, telegraph, television and radio systems, gas and electric systems, water, sewage, and disposal systems.

Quarry—Buildings, structures and land used for the removal of rock, sand, gravel, soil, aggregates and the like for sale or for use in connection with development activity elsewhere.

Recreation Vehicle Park—A parcel of land under one ownership which has been planned and improved and which is let or rented or used for the temporary placement of camp trailers and camping

vehicles which are utilized for non-permanent residential use.

Religious Facilities—Buildings, other structures, and land land designed to be used for purposes of worship.

Residential — Uses and facilities pertaining primarily to the occupation of buildings for living, cooking, sleeping and eating by permanent residents, persons who own recreation homes, and tenants and guests of such residents and persons.

Resource Management and Agriculture—Uses and facilities for the utilization of natural resources such as forest products removal, grazing and mineral extraction.

Service Stations—Uses and facilities designed to provide services for motor vehicles and operations incidental thereto limited to retail sale of gasoline, oil, tires, batteries and accessories, automobile washing, tire changing and repairing, battery service, radiator cleaning, installation of minor accessories, lubrication of motor vehicles, brake repairs, and the testing, adjustment and replacement of such equipment as carburetors, coils, condensors, distributor caps, fan belts, filters, generators, points, rotors, spark plugs, voltage regulators, fuel pumps, water hoses, and wheel balancing.

Single Family Dwelling Unit—One room or group of two or more rooms, other than in a mobile home, containing one or more bedrooms, with not more than one kitchen, designed to be occupied permanently as an independent housekeeping unit by one family or one collective household with facilities for living, cooking, sleeping and eating.

Single Family House—A detached building containing one single family dwelling unit.

Skiing Facilities — Uses and facilities pertaining to skiing including, but not limited to, runs, towlines, cables, cars, warming huts, caretaking quarters, day lodges, shops for sale and rental of skiing equipment, ski pro shop, first aid stations, ski school assembly and instruction areas, and lounges and associated eating and drinking establishments, but not including residential or tourist residential uses and facilities.

Structure—Anything constructed or built, or any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground.

Subdivision—Any real property which is divided into two (2) or more condominiums or into five (5) or more lots, or in which five (5) or more undivided interests are created or are proposed to be created.

Tourist Residential—Uses and facilities pertaining primarily to the use of buildings and portions of buildings for living and sleeping by tourists and other transient visitors who rent by the day or week.

Tract Office—A structure other than a trailer or mobile home used to house activities relating to the sale or rental of dwelling units contained in the particular subdivision or other development in which the tract office is located. A tract office does not include a facility used for the purpose of the sale or rental of real property located outside the subdivision or other development with which it is primarily associated.

Transient Dwelling Units—One bedroom or a group of two or more rooms containing no more than one bedroom, and designed to be rented primarily by the day or week and to be occupied temporarily by one or more individuals whose permanent residence is elsewhere. Hotels and motels normally contain transient dwelling units.

Transportation Facility—Buildings, structures and land used for such purposes as bus terminals, railroad stations, and motor vehicle freight terminals, but not including airports or heliports.

Undeveloped Campgrounds—Land or premises designed to be used for temporary occupancy by campers traveling by foot or horse which may contain such facilities as fireplaces, but do not contain such facilities as are provided at Developed Campgrounds.

Water Crossing or Diversion Structures—Any structure designed to alter or cross any stream, river or other body of water.

Section 4.00 Permit Procedure

4.10 *When Required*

No person shall undertake or carry out any of the following activities without first obtaining a permit from the permit-issuing authority:

(1) Any construction or use involving the creation of land coverage on an area greater than 200 square feet;

(2) any construction or use for which an administrative permit or variance permit as required by this Ordinance must first be issued by the permit-issuing authority.

4.20 *Application Form*

4.21 Applicants for permits shall submit the application and information required to the permit-issuing authority which shall review the application in accordance with the requirements of this Ordinance, and recommend any changes which are necessary to satisfy the standards established by this Ordinance. No permit shall be issued unless there is compliance with all the requirements of this Ordinance.

4.22 *Information Required*

Applicants for permits required under Section 4.10(2) shall furnish a Land Capability Report prepared by a person or firm qualified by training and experience to have expert knowledge of the subject. The permit-issuing authority shall determine the adequacy of the Report and may require the submission of further information where necessary. The Report shall contain information as provided in Section 8.27 to the extent necessary to show that the standards required for the particular administrative permit or variance permit sought by the applicant have been satisfied and any

other information required by this Ordinance and by the adopted Rules and Regulations of Practice and Procedure of the Agency.

4.30 *Agency Review of Permits*

4.31 Permits required pursuant to Section 4.10(1), and any other permit required by the permit-issuing authority but not required by this Ordinance, shall become final without the necessity of review by the Agency, *provided, however,* that the fact that a permit becomes final without the necessity of review by the Agency shall not foreclose any judicial action authorized by the Tahoe Regional Planning Compact to enforce the provisions of this Ordinance.

4.32 Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon review of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the Agency does not take final action

within 60 days, the permit shall be deemed approved.

4.33 When an application for a permit is received by the permit-issuing authority, it shall immediately notify the Agency in writing of the following: (1) the fact that an application has been received; (2) the type of permit for which the application is made; and (3) the nature, scope and location of the construction, use, or land coverage proposed. Upon receipt of such documents, the Executive Director of the Agency and its staff shall cooperate with the permit-issuing authority when requested to do so by the permit-issuing authority in interpreting and applying the standards of the Ordinance to the construction, use or land coverage for which the permit application has been made.

4.34 The permit-issuing authority shall notify the Agency of all permits issued by it for any construction or use within the Lake Tahoe region. All permits issued and reported to the Agency shall be reviewed by the Agency staff, and all permits required pursuant to Section 4.10(2) shall be reported by the staff with

staff recommendations to the governing body of the Agency for its review and action as provided in Section 4.32. The staff report and recommendations shall be available to the public at least 5 days prior to the meeting of which the permit issued pursuant to Section 4.10(2) is reviewed by the Agency. Reference to the permit shall be made in the agenda of such meeting and the applicant and other interested persons shall be afforded opportunity at such meeting to comment on the permit.

Section 5.00 Nature of Regional Land Use Ordinance

5.10 This section is descriptive and not directory and is only intended to explain in general terms the nature and operation of this Regional Land Use Ordinance which consists of the establishment of ten use districts in conjunction with seven land capability districts within the territory of the Lake Tahoe region.

5.20 This Ordinance includes regulations concerning the uses permissible within each of the ten use districts, and concerning the permissible amounts of land coverage which may be created in connection with any development within each of the seven land capability districts.

Section 7.00 Use Districts

7.10 Regulations indicating the allowable land uses in each district are hereby established as set forth in Sections 7.20 through 7.113. In the cases of those uses listed in Section 7.12 the permit-issuing authority shall require an appropriate administrative permit, in accordance with Section 8.33, before such use shall be authorized. The permitted uses shall include accessory uses consistent with such permitted uses. The permitted uses are stated as illustrative of the types of uses consistent with the Tahoe Regional General Plan. The listings are not intended to be exclusive, except the density limitations set forth in Sections 7.30 through 7.90.

7.11 *General Purposes*

(1) To protect ecologically fragile areas and the quality of the lakes of the Tahoe Region.

(2) To maintain the natural scenic quality of the Lake Tahoe Region.

(3) To assure population levels within the Region that will maintain an equilibrium between the Region's natural endowment and its manmade environment.

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7.12 *Uses Requiring an Administrative Permit*

No person shall commence or carry out any of the following uses or activities, or erect any of the following structures, without first having obtained an administrative permit from the permit-issuing authority:

(1) Airports, heliports and landing strips

(2) Batch plants

(3) Bulk Storage

(4) Commercial developments covering three or more acres

(5) Commercial forest products removal

(6) Commercial parking lots

(7) Construction in stream channels

(8) Fish and Wildlife management projects

(9) Developed campgrounds

(10) Educational facilities, general

(11) Electric power plants

(12) Electrical substations

(13) Golf Courses

(14) Harbors

(15) Hotels, Motels and Apartment houses of five or more units

(16) Marinas

(17) Medical facilities

(18) Mobile home parks

(19) Organized recreation camps

(20) Multiperson dwellings

(21) Outdoor amusement facilities

(22) Outdoor recreation concessions

(23) Overhead or underground utilities, but excluding service connections

(24) Public services

(25) Highways, roads and structures

(26) Sewage treatment plant

(27) Water storage tanks and reservoirs

(28) Water treatment plant

(29) Quarries

(30) Recreation vehicle park

(31) Religions facilities

(32) Radio, TV and telephone relay stations and transmission lines and structures

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(33) Skiing facilities

(34) Private stream crossing

(35) Solid waste transfer stations

(36) Transportation facilities

(37) Wrecking yards

7.13 *Limitations on Height*

No building or other structure erected in any land use district shall have a height greater than that specified below except that the permit-issuing authority, by administrative permit pursuant to Section 8.33, may authorize a greater height to the extent that the permit-issuing authority determines that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area. Only those administrative permits that allow a building or other structure of a height of 45 feet or more shall be subject to Agency review pursuant to Section 4.32. Appurtenances such as chimneys and vents may be be erected to a fifteen (15) percent greater height than specified below. Building height shall be the vertical dis-

tance from the grade to the highest point of the coping of a flat roof, or to the deck line of a mansard roof, or to the average height of the highest gable of a pitch or hip roof. Grade is the average of the finished ground level at the center of all walls of a building or structure.

Use District	*Permitted Height*
General Forest	35 feet
Recreation	35 feet
Rural Estates	35 feet
Low Density Residential	35 feet
Medium Density Residential	35 feet
High Density Residential	35 feet
Tourist Commercial	40 feet
General Commercial	40 feet
Public Service	40 feet
Conservation Reserve	As approved in a specific plan

The above table of permitted heights may be modified with respect to residential buildings by permitting height limits of 35 feet plus 1 foot for each 2% of cross slope, measured at the building site coverage.

7.14 *Reclassification of Privately Owned Lands Within General Forest and Conservation Reserve Districts*

After two years from the effective date of this Ordinance, an owner of lands within either the General Forest District

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or the Conservation Reserve District may apply, and the Agency shall then consider, whether to reclassify the applicant's lands to a less restrictive land use classification. In the event of such reclassification, either by an amendment of the Regional Plan or in any other appropriate manner, said lands shall nevertheless be subject to the Land Capabilities Map in effect on the date of reclassification.

(1) *Residential:*

(a) Single family dwelling units up to 15 dwelling units per acre;

(b) Multiperson dwellings not to exceed facilities for 40 persons per acre;

(c) Mobile home parks for permanent residences up to 8 mobile homes per acre.

(2) *Tourist Residential:* None

(3) *Outdoor Recreation:*

(a) All those permitted in the Medium Density Residential District.

(4) *Resource Management and Agriculture:*

(a) Forest management programs.

(5) *Public and Quasi-Public:*

(a) All those permitted in the Medium Density Residential district;

(b) Cultural facilities.

(6) *Commercial:*

(a) All those permitted in the Medium Density Residential district;

(b) Professional offices.

7.73 *Limitations on Land Coverage*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.80 *Tourist Commercial District*

7.81 *Specific Purposes:*

(1) To provide adequate space for motels, hotels and related facilities to house and provide services for tourist visitors to the Region in appropriate locations.

7.82 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33 which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*

(a) Single family dwelling units up to 15 dwelling units per acre;

(b) Multiperson dwellings not to exceed facilities for 40 persons per acre;

(c) Mobile home parks for permanent residences up to 8 mobile homes per acre.

(2) *Tourist Residential:*

(a) Transient dwelling units up to 40 units per acre, provided that up to 10% of such dwelling units contained in any motel or other development devoted to the provision of transient dwelling units may include kitchen facilities;

(b) Recreation vehicle parks up to 15 mobile homes per acre.

(3) *Outdoor Recreation:*

(a) All those permitted in the High Density Residential District;

(b) Skiing facilities;

(c) Outdoor amusement facilities.

(4) *Resource Management and Agriculture:*

(a) Forest management program.

(5) *Public and Quasi-Public:*

(a) All those permitted in the High Density Residential district;

(b) Transportation facilities.

(6) *Commercial and Industrial:*

(a) All those permitted in the High Density Residential district;

(b) Indoor amusement facilities;

(c) Limited commercial;

(d) Service stations.

(3) In the case of an application pursuant to Section 8.25(3), the Land Capability Report need establish only that standards of that section have been satisfied.

8.28 *Additional Land Coverage—Variance*

Land coverage in excess of that permitted in any Land Capability District, up to the maximums stated in

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this Section, may be authorized by a variance permit issued by the permit-issuing authority, where a literal enforcement of the Ordinance deprives such property or privileges enjoyed by other property in the vicinity and within the same Land Capability District, and the applicant shows that he cannot make any reasonable use of his property if such regulations are applied. Where such conditions are found, the additions permitted shall be the minimum departure from existing maximums reasonably necessary to avoid the deprivation of privileges enjoyed by such other property and to facilitate a reasonable use, and which will not create significant probabilities of substantial harmful environmental consequences. In no case may a variance permit be granted that provides the applicant with any special privileges not enjoyed by other properties in the vicinity. The maximum permissible additions shall not exceed 100% of the limits on land coverage in Land Capability districts 1, 2 and 3, and 10% of the limits on land coverage in Land Capability districts 4, 5, 6 and 7, as set forth in Section 6.20.

8.30 *Effects of Establishing Use Districts*

8.31 Except as provided hereinafter, no person shall, and the permit-issuing authority shall not permit any person to erect any buildings; move, alter, add to, or enlarge any existing building; use, designate, or intend to use for any purpose any land, building or premises in any manner other than is included among the uses listed as permitted in the Use District in which such building, land, or premises is located.

8.32 *Calculation of Densities*

The number of dwelling units per acre permitted in a Rural Estate, Low, Medium or High Density Residential, and Tourist Commercial District, and transient dwelling units per acre permitted in a Tourist Commercial and Commercial District, shall be determined in the first instance on the dwelling units per acre permitted in the Use District in which the land is located. Such number of permitted dwelling units per acre may be limited below the maximums expressed by virtue of the limitations on land coverage applicable within the Land Capability District within which the land is

located. In addition to the foregoing, the area upon which the appropriate density calculation is based shall not include existing bodies of water such as lakes and ponds. Densities up to 10% in excess of the maximums permitted may be authorized by the permit-issuing authority where the applicant's plans provide for a total amount of land coverage, as calculated in accordance with Sections 8.22 and 8.23, 5% or more below the baseline maximums established for the Land Capability Districts within which the land is located, and it is determined that increase in density will not cause substantial problems of traffic congestion or inadequacy of public services.

8.33 *Administrative Permits*

Administrative permits may be issued for any of the uses or purposes for which such permits are required by the terms of this Ordinance. Such permit may be granted only if it is found by the permit-issuing authority that the establishment, maintenance, or operation of the use or purpose in the particular case is not detrimental to health, safety, peace, morals, comfort and

general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

8.34 *Variances*

Variances from the terms of the Use Regulations established in this Ordinance shall be granted by the permit-issuing authority only if it is found that because of special circumstances applicable to the property, including size, shapes, topography, location or surroundings, the strict application of the use regulations deprives such property of privileges enjoyed by other property in the vicinity and within the same Use District, and the applicant shows that he cannot make any reasonable use of the property if such regulations are applied. Where such conditions are found, the variance permitted shall be the minimum departure from existing regulations necessary to avoid such

deprivation of privileges enjoyed by such other property and to facilitate a reasonable use, and which will not create significant probabilities of harm to property and improvements in the neighborhood or of substantial harmful environmental consequences. In no case may a variance be granted that will provide the applicant with any special privileges not enjoyed by other properties in the vicinity.

Section 9.00 Non-Conforming Uses, Structures and Alterations

9.11 *Existing Uses and Structures*

Uses of land and structures that do not conform to the regulations established by this Ordinance and which lawfully existed on February 10, 1972, or which are to be created in connection with structures for which a valid building permit was issued on or before February 10, 1972 and upon which construction has commenced as allowed by such permit prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government and where necessary by the Agency within five (5) years prior to

February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government more than five (5) years prior to February 10, 1972 and there has been construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction prior to February 10, 1972 are non-conforming uses and structures and a use to be created it shall occupy no greater than planned at the time such building permit was issued or subdivision approved. If any such use ceases for a period of one (1) year, subsequent use of such land shall be in conformity with the regulations contained in this Ordinance.

9.30 *Creation of Lots or Parcels*

No person shall create a lot or parcel upon which there will exist more than the maximum number of dwelling units or maximum percentage of land coverage permitted by this Ordinance, *provided, however,* that more than such maximums may be created in connection with a subdivision, the tentative map of which is approved by the Agency pursuant to the provisions of the Tahoe Regional Planning Agency Subdivision Ordinance.

9.31 Where a lot or parcel is divided, the person making the division shall calculate the number of dwelling units and land coverage allocable to each of the resulting lots or parcels and shall note such allocations in the deeds to such resulting lots or parcels and on the lot or parcel map, if any, that is used to record such division.

Section 10.00 Compact Limitations

The provisions of this Ordinance shall be subject to the express requirement contained in Article VI(a) of the Compact (PL 91-148) which requires that:

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment."

Section 11.00 Violation of Ordinance

Violation of any provision of this ordinance shall be a misdemeanor.

Section 12.00 Effective Date

This Ordinance shall be effective sixty (60) days after its adoption.

FIRST READING: April 26, 1973

SECOND READING: May 24, 1973

PASSED AND ADOPTED by the Governing Body of the Tahoe Regional Planning Agency at a regular meeting held May 23-24, 1973 by the following vote:

Ayes: Mr. Bray, Mr. Hall, Mr. Stewart, Mr. Henry, Mr. MacKenzie, Mr. Meder

Nays: None

Abstain: None

Absent: Mr. Knisley, Mr. Eagan, Mr. Meneley, Mr. Nagy.

John L. Meder
Chairman

tations:

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75–136

PEOPLE OF THE STATE OF CALIFORNIA EX REL. EVELLE J. YOUNGER, ATTORNEY GENERAL,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY, TED JENNINGS AND OLIVER KAHLE, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF NEVADA AS AMICUS CURIAE

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Attorneys for Amicus Curiae.

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INTEREST OF AMICUS CURIAE

The extent and nature of sovereignty surrendered by Califronia and Nevada is directly at issue in this litigation. Nevada has a very real interest, as a sovereign state and as one of the contracting parties in the outcome of this litigation.[1] Indeed, Nevada has the identical interest insofar as the extent of sovereignty surrendered to the Tahoe Regional Planning Agency is drawn into this question. To the extent the bi-state agency's powers and the manner

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[1]Although not a party to the proceedings below Nevada did file an *amicus* brief with the Ninth Circuit in support of the District Court's decision.

of its exercising control might be enlarged—the sovereignty of Nevada is thus diminished.

ARGUMENT

I.

THE COURT OF APPEALS' HOLDING THAT THE DUAL MAJORITY AND 60 DAY FINAL ACTION PROVISIONS OF THE COMPACT ARE TO BE GIVEN THEIR PLAIN MEANING IS UNASSAILABLE IN LAW AND REASON.

From the inception of this litigation, California has maintained, without demonstrating any legal basis therefor, the position that both states had abdicated their sovereignty over control of land use to the Tahoe Regional Planning Agency (hereinafter called TRPA). Having lightly passed over consideration of relinquishment of sovereignty, California next proceeds to the position that no lake basin project or development can take place if a majority of one state's delegation rejects it because otherwise the goals of preserving the ecological balance of Lake Tahoe might be compromised. In other words, California contends that unless the Compact is construed as creating a super powerful bi-state agency the Tahoe Regional Planning Agency will be less efficacious in treating the ecological ills of the Lake Basin. California conveniently ignores the structure of the TRPA as it was established by the Compact. Her position completely ignores the dual majority provision written into the Compact at Nevada's insistance. It further ignores the requirement of Article VI(k) that TRPA take final action to approve, modify or reject a project within 60 days.

California failed to convince the District Court and Court of Appeals to read Article III(g) and VI(k) as though agency action is taken even though the Agency fails to approve, to modify, or to reject the project.

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District Judge Thompson stated (Petitioner's Brief, Appendix A, Page 4), "I don't see anything equivocal, ambiguous or uncertain about that provision [III(g)]. It is very specific. It provides, in clear and unambiguous terms, that a majority of the quorum present from each state has to agree before action can be taken." The District Judge also ruled that VI(k) was not simply a time limitation, but that this Article also specifies the review powers of the Agency and observed (Petitioner's Brief, Appendix A, Page 5), "The stalemate in the Agency because of the Charter provision that there must be a majority vote from the quorum present from each state for action to be taken constitutes no action; it is not either approval, rejection or modification."

The Ninth Circuit also rejected California's view that the provisions are ambiguous saying its argument "simply does not take into account the plain meaning of the compact, and the intent of its architects." (Petitioners' Brief, Appendix B, Page 15.)

There is ample grounds for arguing that these provisions are not in need of construction in the first instance since their plain meaning is immediate and obvious. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise. *Caminetti v. United States*, 242 U.S. 470, 485.

II.

THE COURT OF APPEALS OPINION AFFORDS SUFFICIENT DIRECTION TO THE TAHOE REGIONAL PLANNING AGENCY AND COMPACTING STATES IN CARRYING OUT THE COMPACT.

California argues that certiorari should be granted so that this Court may provide direction to California and Nevada and to other states sharing common boundaries bisecting natural resource areas. (Petitioner's Brief, Page 18.)

Nevada submits that the Court of Appeals opinion provides a

clear and certain guideline to the Tahoe Regional Planning Agency and to Nevada and California. The Court of Appeals noted (Petitioners' Brief, Appendix B, Page 17) that the Tahoe Regional Planning Agency construed its review powers in its land use regulations the same as the Court of Appeals construed them. The Tahoe Regional Planning Agency cannot be in a quandary as to its procedures and powers. The Ninth Circuit has agreed with the Agency on its powers and regulations.

The Court mandate to the Agency is simply if it wants to take review action a majority of each state's membership must vote to approve, to modify, or to reject a project within 60 days or such project will be declared approved.

The Ninth Circuit's opinion serves as a clear admonition to other states contemplating bi-state cooperation that failure of the states to relinquish fully its police power over land use planning to a bi-state agency will result in a less powerful "anti-growth measure."

There is no need to involve this Court in what is an obvious lesson to be learned from two states who were extremely reluctant to relinquish fully their sovereignty over a portion of their territory.

III.

THIS IS NOT A CASE OF A PARTY STATE TO A COMPACT REFUSING TO CARRY OUT ITS COMPACT OBLIGATIONS.

Historically, this Court has exercised its original jurisdiction in disputes between compacting states over fulfillment of their compact obligations. Ordinarily, certiorari has been granted only in interstate compact litigation *not* between states[2] to review decisions

[2]*Hindelider v. La Plata Co.*, 304 U.S. 92, *Delaware River Bridge Comm., v. Colburn*, 310 U.S. 419; *Dyer v. Sims*, 341 U.S. 22.

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of the highest state court since construction of a compact is ultimately one for the federal courts. *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 279.

But unlike such cases, the present litigation does not involve a "federal title, right, privilege or immunity, which when specially set up and claimed in a state court" may be reviewed by this Court on certiorari. This case arose in the federal district court and thereafter was appealed to the Ninth Circuit Court of Appeals. Both federal courts have exhaustively considered the questioned compact provisions and both have rather conclusively rendered the only available construction in light of their plain meaning.

This is not a case where both compacting states are parties before this Court for determination of a controversy and this Court must therefore pass upon every question essential to such a determination. *Kentucky v. Indiana*, 281 U.S. 163, 177.

Nor is this a case where Nevada or California has attempted, as West Virginia attempted in the concurring words of Mr. Justice Jackson "raise an issue . . . decide it, and release herself from an interstate obligation." *Dyer v. Sims*, 341 U.S. 22, 35. Nor does the present litigation involve a recalcitrant state seeking to renege on its compact obligations, or by subterfuge, avoid them.

The present litigation is a dispute between one compacting state and two owners of property within the other compacting state.

Although Nevada does disagree with California's interpretation of Articles III(g) and VI(k), such disagreement has not led to any disruption in the Agency's operations and both states' membership delegations continue to act as the governing body.

Even if this case were to be viewed as a controversy between the two states, and Nevada respectfully submits that it is not, then in such event, certiorari should also be denied and the original jurisdiction of this Court be invoked if, and when, a controversy

disruptive and destructive of the compact should arise between California and Nevada.

IV.

CONTRARY TO CALIFORNIA'S ASSERTION THIS CASE DOES NOT REQUIRE DEFINITION OF SOVEREIGN INTERESTS NEVER BEFORE PASSED UPON BY THIS COURT.

California asserts (Petitioner's Brief, Page 18), that since this is the first time a state has attempted to stop construction in a neighboring state "pursuant to a bi-state compact" that a definition of sovereign interests is involved which this Court has never passed on and therefore should do so. While this may be the first case involving construction of buildings in a neighboring compact state, it is not the first time a state has sought to void or hinder a compact's operation in the other compact states. *Kentucky v. Indiana, supra; Dyer v. Sims, supra.*

In any event, there is no sovereign interest which needs to be defined. California has no sovereign interest in Nevada's territory beyond that granted to the Tahoe Regional Planning Agency. California and Nevada did not relinquish sovereignty to each other at all. On the contrary, the Tahoe Regional Planning Agency, as the Court of Appeals noted, (Petitioner's brief, Appendix B, Page 16) is *sui generis.* It is the Tahoe Regional Planning Agency that exercises whatever sovereignty that California and Nevada relinquished to it. California has no sovereign interest in Nevada at all and consequently none to be defined.

California further poses the lurid spectacle of a strip mining project being approved under the Court of Appeals holding, and argues that the Court of Appeals failed to realize that its decision necessarily allows one state's delegation to be overruled by the other. This is true. But the situation would be no different if California's view had been adopted by the Court of Appeals. That is,

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California's delegation would have overruled the Nevada delegation's decision to build the hotels.

California further confuses the matter when it urges (Petitioner's Brief, Page 9), that the Court of Appeals reading of the Compact "is to return the region to the pre-compact era when each state would allow whatever development it wished without considering the concerns of the other state." But California, on the following page, goes on to state that under the Court of Appeals decision, "each [state] can no longer even control development within its own border."

It is therefore not altogether surprising that the Court of Appeals turned away from these inconsistent blandishments and looked at the plain meaning of the words "action", "majority" and "final action".

V.

THIS COURT SHOULD REFUSE TO LEND ITS AID TO REWRITING THE COMPACT AND SHOULD DEFER TO THE STATE LEGISLATURES AND THE CONGRESS.

California's petition, bared to its essentials, is really a plea that the Compact be interpreted as a complete surrender of sovereignty to the Tahoe Regional Planning Agency; and that the Agency be deemed a super powerful bi-state Agency. California says that any other construction of Articles III(g) and VI(k) would frustrate the stated policies of the Compact and cites Article VIII(a) which provides that the Compact provisions shall be reasonably and liberally construed to effectuate its purposes.

Of course, a reasonable and liberal construction is to be preferred whenever a Compact provision contains ambiguous words or uses words in an ambiguous manner. In effect, California asked the Court of Appeals, and now asks this Court, to read out of Article III(g) the words "from each state", "members present

representing each state"; and "to take action." California also asks that the requirement of Article VI(k) that the Agency must take final action either to approve, to modify, or to reject within 60 days be read out of the Compact. This the Court of Appeals declined to do and instead admonished California (Petitioners' Brief, Appendix B, Page 19) that its remedy lies solely with the legislatures of the compacting parties.[3]

[3]The 1975 Nevada Legislature after extended public hearings, refused to enact S.B. 254 which would have amended III(g) and VI(k) to remove the dual majority and 60 day final action provisions.

CONCLUSION

For the foregoing reasons, in addition to the reasons stated by the Respondents, the petition for certiorari should be denied.

DATED: Carson City, Nevada 89710, Capitol Complex; August 15, 1975.

ROBERT LIST
Attorney General of Nevada

JAMES H. THOMPSON
Chief Deputy Attorney General

Attorneys for the State of Nevada
as Amicus Curiae

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